THE INTELLECTUAL ORIGINS OF THE ESTABLISHMENT CLAUSE

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For decades, scholars have debated the Framers' intentions in adopting the Establishment Clause. In this Article, Professor Noah Feldman gives an account of the intellectual origins of the Establishment Clause and analyzes the ideas that drove the debates over church and state in eighteenth-century America. The literature on the history of the Establishment Clause has categorized discrete strands of eighteenth-century American thought on church-state relations, divided by distinct motives and ideologies. Feldman argues that this is a mischaracterization and proposes instead that a common, central purpose motivated the Framers to enact the Establishment Clause—the purpose of protecting the Lockean value of liberty of conscience. Feldman begins by providing an archeology of the idea of liberty of conscience, from Luther and Calvin to Locke. He then presents his account and analysis of the intellectual origins of the Establishment Clause in eighteenth-century American thought. He considers possible uses of this history, then concludes with observations on the utility of using intellectual history in constitutional analysis of cases invoking the Establishment Clause.

INTRODUCTION

The Establishment Clause is in the news. Within a week of his inauguration, President George W. Bush announced the formation of a new Office of Faith-Based Programs to encourage funding of private, religious charitable initiatives.[1] This followed a race for the presidency in which Democratic vice-presidential candidate Senator Joseph Lieberman spoke of religion as a basis for political values so frequently that the *New York Times* rained down disapprobation on him from its editorial page.[2] Simultaneously, the constitutional challenge to vouchers for religious schools has percolated through the

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[1] Frank Bruni & Laurie Goodstein, New Bush Office Seeks Closer Ties to Church Groups, N.Y. Times, Jan. 29, 2001, at A1.

[2] Editorial, Mr. Lieberman's Religious Words, N.Y. Times, Aug. 31, 2000, at A24. Some of Senator Lieberman's ideas are set out in Joseph Lieberman, In Praise of Public Life 139-51 (2000) (arguing importance of religion to American public life).

courts of appeals to the Supreme Court, where it will be heard and decided in the October 2001 Term.[3]

The historical origins of the Establishment Clause played a significant role in all this discussion. Senator Lieberman was attacked for paraphrasing George Washington's warning "never to indulge the supposition 'that morality can be maintained without religion.'"[4] President Bush's various proposals stimulated a rich discussion about whether state assistance to faith-based programs is compatible with the Framers' ideas about church and state.[5] Perhaps most impor-

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[3] The decision to be reviewed on this issue is the Sixth Circuit decision finding that a Cleveland, Ohio school-voucher program violated the Establishment Clause. See Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), cert. granted, 122 S. Ct. 23 (No. 00-1751, 2001 Term). The Ohio Supreme Court held the same program to be constitutional. See Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999). Other decisions on the issue include Chittenden Town School District v. Department of Education, 738 A.2d 539 (Vt. 1999) (holding that voucher program violated Vermont Constitution provision barring compelled support for religion); Holmes v. Bush, No. CV 99-3370, 2000 WL 526364, at *1 (Fla. Cir. Ct. Mar. 14, 2000) (holding that voucher program violated state constitutional mandate to deliver education through public schools); see also Jeffrey Rosen, Is Nothing Secular?, N.Y. Times, Jan. 30, 2000, § 6 (Magazine), at 40 (discussing voucher cases). The U.S. Supreme Court denied certiorari to a case in which the Wisconsin high court upheld the voucher system in Milwaukee. See Jackson v. Benson, 578 N.W.2d 602, 617 (Wis. 1998), cert. denied, 525 U.S. 997 (1998). For a review of the decisions in Wisconsin, Ohio, and Vermont, see Joseph P. Viteritti, Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657, 685-99 (1998); see also Michael Janofsky, Parents Lead Way as States Debate School Vouchers, N.Y. Times, Jan. 31, 2000, at A1 (describing debate in twenty-five state legislatures on voucher proposals). The academic literature on the constitutionality of school voucher programs is extensive. See, e.g., Alan E. Brownstein, Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix, 31 Conn. L. Rev. 871 (1999); Steven K. Green, The Legal Argument Against Private School Choice, 62 U. Cin. L. Rev. 37 (1993); Marci A. Hamilton, Power, the Establishment Clause, and Vouchers, 31 Conn. L. Rev. 807 (1999); Frank R. Kemerer, The Constitutional Dimension of School Vouchers, 3 Tex. F. on C.L. & C.R. 137 (1998); Michael W. McConnell, Governments, Families, and Power: A Defense of Educational Choice, 31 Conn. L. Rev. 847 (1999); Martha Minow, Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It, 49 Duke L.J. 493 (1999) [hereinafter Minow, Choice or Commonality]; Martha Minow, Reforming School Reform, 68 Fordham L. Rev. 257 (1999). For an earlier discussion of the constitutionality of vouchers, see Walter McCann & Judith Areen, Vouchers and the Citizen—Some Legal Questions, in Educational Vouchers: Concepts and Controversies 110, 117-24 (George R. La Noue ed., 1972).

[4] Editorial, supra note 2. What Washington in fact said was: "[L]et us *with caution indulge* the supposition that morality can be maintained without religion." George Washington, Farewell Address (Sept. 17, 1796), in 1 A Compilation of the Messages and Papers of the Presidents 205, 212 (James D. Richardson ed., 1911) (emphasis added). **R**

[5] See generally Religion in American Public Life: Living with Our Deepest Differences (Azizah Y. al-Hibri et al. eds., 2001); Sacred Places, Civic Purposes: Should Government Help Faith-Based Charity? (E.J. Dionne Jr. & Ming Hsu Chen eds., 2001); What's God Got To Do with the American Experiment? (E.J. Dionne Jr. & John DiIulio Jr. eds., 2000); Who Will Provide?: The Changing Role of Religion in American Social Welfare (Mary Jo Bane et al. eds., 2000).

tantly, even the least originalist of the justices has approached Establishment Clause cases by saying that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[6]

Yet despite the manifest importance of what the Framers thought about church and state, in recent years there has been no attempt in the academic literature to set out a comprehensive history of the ideas that led to the emergence of the Establishment Clause. Much has been written about the institutional details of church-state relations in the states before the enactment of the Establishment Clause,[7] and about the federal government's encounters with religion in the early years after the ratification of the Constitution.[8] Academics have been arguing for almost half a century about what the Framers intended institutionally when they settled on the precise formulation barring Congress from making a law "respecting an establishment of religion."[9] But aside from these debates, deeper questions about what ideas informed the Framers' thinking about church and state, and how these ideas informed the institutional designs the Framers adopted, have not, in recent years, received the attention they deserve.[10]

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[6] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring); see also Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933, 933 (1986) (noting Brennan's originalism on this score).

[7] Three books published in 1986 alone addressed this topic: Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986); Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1986); and William Lee Miller, The First Liberty: Religion and the American Republic (1986). Levy and Curry focused extensively on the details of church-state relations in the states before the enactment of the Establishment Clause. For a short joint review of all three books, see Mark V. Tushnet, The Origins of the Establishment Clause, 75 Geo. L.J. 1509 (1987). The same year saw a symposium in the *William & Mary Law Review* in which several writers touched on these topics. See, e.g., Philip B. Kurland, The Origins of the Religion Clauses of the Constitution, 27 Wm. & Mary L. Rev. 839, 853-60 (1986) (offering, despite its title, brief look at possible motivations for drafting of Establishment Clause).

[8] For just a handful of examples, see Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction 251-60 (1982), which provides examples of the early presidents' proclamations of days of prayer; and Harold J. Berman, Religion and Law: The First Amendment in Historical Perspective, 35 Emory L.J. 777, 780-82 (1986), which analyzes the states' continued support of Christianity. For a prominent judicial attempt to grapple with the history of the Establishment Clause, see Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting), in which Justice Rehnquist argues that the Establishment Clause was intended only to bar preferential support of religion.

[9] See, e.g., Levy, supra note 7, at 113-19 (criticizing nonpreferentialist interpretation of Establishment Clause). R

[10] One thoughtful approach to the reasons for enactment of the Establishment Clause is Steven D. Smith, Separation and the "Secular": Reconstructing the Disestablishment Decision, 67 Tex. L. Rev. 955 (1989); the article became part of Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995)

This Article sets out to provide a comprehensive account of the intellectual origins of the Establishment Clause.[11] It aims to answer the question *why* the Framers thought separating church and state was a good idea. Getting the answer right matters for at least two reasons: First, the intellectual origins of the Establishment Clause form a crucial part of the history of constitutional ideas. Second, the intellectual origins of the Establishment Clause matter for debates that are as live today as they were two hundred years ago. This Article's goal, therefore, is not to do "lawyers' history" but to do serious intellectual history that is also useful to lawyers.

This Article's analysis of the ideas and arguments deployed in the early debates about church and state sets out to revise much of what has recently been written about the Establishment Clause. The literature touching on the intellectual origins of the Establishment Clause generally advances the view that the different players in the debates over church and state were informed by a series of distinctly different ideas.[12] It characterizes the arguments about church and state as rationalist-philosophical on the one hand—exemplified by Jefferson, Madison, and Deism—and evangelical on the other hand—exemplified by dissenting Baptists in New England and Virginia.[13] According

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[hereinafter Smith, Foreordained Failure]. Smith's general view, with which this Article disagrees, is that no single historical principle can explain the purpose of the Clause adequately, because the Clause was framed as a compromise between incompatible positions. Smith's pessimistic view extends to both religion clauses. Cf. Frank Guliuzza III, The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case, 42 Drake L. Rev. 343, 362-76 (1993) (arguing that incompatibility of different historical theories of Establishment Clause makes originalism unlikely to resolve cases satisfactorily). For a treatment of some of the intellectual sources of the religion clauses that differs drastically from my own, see Stephen M. Feldman, Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State (1997). Stephen Feldman emphasizes a strand of "anti-Semitism" in the sources he treats.

[11] Cf. Bernard Bailyn, The Ideological Origins of the American Revolution (1967). Bailyn includes a fascinating discussion of the topic of establishment, in which he emphasizes the political context of the revolutionary period as a factor that drove arguments for state disestablishments. See id. at 246-72.

[12] Probably the most influential formulation of this idea is Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (1965). For another early formulation, see Donald A. Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 Harv. L. Rev. 1381, 1386 (1967) (arguing for different views of different players in church-state debate).

[13] See Howe, supra note 12, at 6-10 (arguing that wall of separation was built as much by Roger Williams's theology as by Jeffersonian philosophy); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1438-43 (1990) (arguing for distinct rationalist, evangelical, and civic republican positions on church-state relations); John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 Notre Dame L. Rev. 371, 377-88 (1996) (describing views on same). **R**

to this schematic view, rationalists wanted to separate church and state because religion is bad for the state, while evangelicals wanted to separate church and state because state involvement is bad for religion.[14] In the 1980s, as American legal academics discovered civic republicanism through J.G.A. Pocock's *The Machiavellian Moment*,[15] some scholars began to argue that there also was a distinct civic republican strand of thinking on church-state issues, according to which religion was good for government because it promoted republican virtue.[16]

This now-canonical categorization of these different strands of ideas on church-state relations is misleading. In fact, by the late eighteenth century, American rationalists and evangelicals alike argued, in terms identifiably derived from John Locke, that the purpose of nonestablishment was to protect the liberty of conscience of religious dissenters from the coercive power of government.[17] Of course, rationalists and evangelicals had differing metaphysical and theological commitments. Some clothed the argument in biblical citations; others preferred a more rationalist-philosophical terminology. But the two groups made the very same argument from liberty of conscience. They proceeded from the same premises to the same conclusion by the same logical steps.

Locke's argument was itself already a complex combination of religious and philosophical logic.[18] Its religious roots lay in the Protestant idea of the primacy of the individual conscience in decisions about matters of religious faith.[19] Its philosophical roots lay in the division of the world into differently-constituted temporal and spiritual realms.[20] Under this division, the temporal power lacked legitimate authority to compel dissenters' conscience in the realm of religion, because no one had alienated to the temporal government

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[14] Howe, supra note 12, at 5-31. R

[15] J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975).

[16] Witte, supra note 13, at 385-88. Historian Colin Kidd recently advanced a similar claim in Colin Kidd, Civil Theology and Church Establishments in Revolutionary America, 42 Hist. J. 1007, 1021-25 (1999). R

[17] The Free Exercise Clause did not grow out of a different set of intellectual concerns; it developed in the same intellectual milieu. But the connection between free exercise and liberty of conscience is more obvious and so requires less proof.

[18] The secondary literature on Locke's view of liberty of conscience itself reflects a tension between those who advocate a philosophical, nonreligious reading of Locke, and those who prefer to emphasize the religious premises of Locke's views. See John Dunn, The Political Thought of John Locke 27-40 (1969) (discussing rationalist reading of Locke and proposing more religiously formed view). For a heterodox analysis of Locke's views on toleration, see Don Herzog, Happy Slaves: A Critique of Consent Theory 165 (1989).

[19] See infra text accompanying notes 129-30. R

[20] See infra text accompanying notes 119-24. R

their rights in matters of religion. It was wrong, therefore, for any government to impose religion on its citizens or subjects.[21]

Establishment of religion, the Framers' generation thought, often had the effect of compelling conscience.[22] Going beyond compulsory church attendance or required forms of worship, the Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.[23] Locke himself never advanced the argument that paying taxes to an established church violated a dissenter's liberty of conscience. But dissenters from Massachusetts to Virginia made this argument in the eighteenth century as an extension of the Lockean argument about conscience, and the argument achieved broad acceptance.[24] Even those who advocated government funding of religion proposed that taxpayers be permitted to designate the denomination of their choice to receive their taxes, or else opt out of paying those taxes altogether. By the late eighteenth century, almost no one in America thought that government legitimately could compel taxes for religious purposes without offering some possibility of formally opting out of the tax.[25]

Liberty of conscience, then, was the central value invoked by the states that proposed constitutional amendments on the question of religion, and the purpose that underlay the Establishment Clause when it was enacted.[26] By contrast, one hears little in eighteenth-century

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[21] See infra text accompanying notes 121-29. R

[22] See infra text accompanying notes 314-15. R

[23] See infra text accompanying note 363. R

[24] See infra text accompanying notes 363-64. R

[25] See infra text accompanying notes 363-64. I do not mean to say that the option was always easy to exercise, for sometimes it was not. I mean only to say that in principle, it was broadly agreed that the option must exist. R

[26] Two subsidiary purposes also played some role in the background of the Establishment Clause. First, the Framers wanted to ensure that religious dissenters could participate in government fully and equally, and they recognized that an established church might make this difficult. See Philip A. Hamburger, Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights, 1992 Sup. Ct. Rev. 295, 366 (noting shift in national attitude toward favoring equality of rights and religious toleration for dissenters). The reason for this was the same as the core Lockean reason for preventing religious coercion: Religion and political authority were metaphysically separate spheres, and hence not relevant to one another. At the constitutional level, however, the main result of this concern for equal participation in government was not the Establishment Clause, but the Constitution's prohibition on religious oaths or tests for service in government. Similarly, when Madison, for example, spoke of "equal" rights of conscience, he did not mean to invoke equality as an independent reason for religious liberty. See James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 4 (1785), in 8 The Papers of James Madison 300 (Robert A. Rutland & William M.E. Rachal eds., 1973). Rather, he meant that religious liberty was a right that ought to extend to every person. It is therefore misplaced to criticize Madison, as does Steven D. Smith, for relying

America about the baleful effects of government funding on religion and still less in an enlightenment vein of the negative effects of religion on the state.[27] The supposed civic republican argument that religion promotes republican virtue also proves elusive in the late eighteenth century. Religion was conventionally thought to promote obedience to law but not particularly republican virtues like independence of spirit or wise self-government.[28]

If the Framers cared mostly about dissenters' liberty of conscience from paying taxes, what follows? Do the intellectual origins of the Establishment Clause matter beyond getting the history right with respect to an important and evergreen constitutional issue? The answer lies in the many uses and misuses of the early history of the separation of church and state in America. Judges, lawyers, academics, and politicians have not ceased laying claim to the legacy of the Framers' ideas about church and state since the modern debate over the subject started in earnest in the 1940s. In recent years, Justice Kennedy has maintained, on historical grounds, that the presence of

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on an "empty" theory of equality. See Steven D. Smith, Getting Over Equality: A Critical Diagnosis of Religious Freedom in America 13-17 (2001). Madison was not relying on equality to do substantive work when he spoke of "equal" rights of conscience.

Second, the religious heterogeneity across states in the 1790s counseled pragmatic caution. Congregationalists dominated New England; Episcopalians had the upper hand in the South; Pennsylvania had a strong Quaker heritage. Some states, like New York, or in a different way, Maryland, were themselves religiously heterogeneous. It would have been difficult to agree on a single national religious denomination, see Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113, 1133 (1988), and the Framers had the practical sense to realize that separating religion from government at the federal level would help avoid serious religious strife. Yet, contrary to some of what has been written on the subject, this pragmatic concern did not amount to a full-blown federalist theory of church-state relations. The Establishment Clause was not intended to enshrine a practice of *cuius regio eius religio*, in which each state would be assured the right to promote its own form of religious establishment. There is precious little in the Framers' thinking describing this sort of federalist notion and its compatibility with establishmentarianism. See infra text accompanying notes 332-46. R

[27] See infra text accompanying notes 251-52. This is true even regarding the enactment of state constitutional amendments barring the clergy from serving in state public office. See, e.g., N.Y. Const. of 1777, art. XXXIX, reprinted in 7 Sources and Documents of United States Constitutions 168, 178 (William F. Swindler ed., 1978) [hereinafter Sources and Documents]; N.C. Const. of 1776, art. XXXI, reprinted in 7 Sources and Documents, supra, at 402, 406; S.C. Const. of 1778, art. XXI, reprinted in 8 Sources and Documents, supra, at 468, 472. One standard form of these provisions, adopted by New York and South Carolina, for example, said the clergy were "dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function" by service in government. N.Y. Const. of 1777, art. XXXIX, reprinted in 7 Sources and Documents, supra, at 168, 178; S.C. Const. of 1778, art. XXI, reprinted in 8 Sources and Documents, supra, at 468, 472. R

[28] See infra text accompanying notes 290-91. R

coercion should be the touchstone of Establishment Clause analysis,[29] while Justice Souter has relied on historical argument to push for a more strongly separationist position.[30] Professor and judicial nominee Michael McConnell has drawn on the history of the Establishment Clause (and the Free Exercise Clause, for the two clauses are closely connected) to argue that the Clause permits government support of religious institutions,[31] while scholars such as Professors Leonard Levy and Douglas Laycock have continued to claim that the historical evidence justifies a strongly separationist position.[32] Getting the history right matters because contemporary legal and political actors use that history to make normative claims. This Article sets out to prove its historical claims about the intellectual origins of the Establishment Clause and then to suggest some ways in which the history ought not be misused.

Part I provides an archeology of the idea of liberty of conscience. Tracing the changing idea of liberty of conscience from Luther and Calvin, through Puritans and Baptists, to John Locke begins the work of writing the intellectual history of this crucially important idea. Locating Locke's ideas in the Protestant thought-world provides valuable background to place the eighteenth-century birth of the Establishment Clause in its full intellectual context. It also encourages us to see just how Locke's arguments for toleration made sense in eighteenth-century America and how the erosion of some of his premises has made it difficult to apply a liberty-of-conscience theory of the Establishment Clause today.

Part II uses the Lockean idea of the liberty of conscience to revise what has become the standard historical account of the different strands of eighteenth-century American thought on religious liberty. Against historians who have emphasized divisions among American thinkers on questions of liberty of conscience, this Part argues that the Lockean argument about liberty of conscience was broadly shared by rationalists, evangelicals, and even civic republicans. Indeed, by the 1780s, most Americans agreed, in principle, on a basic Lockean theory

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[29] County of Allegheny v. ACLU, 492 U.S. 573, 659-61 (1989) (Kennedy, J., concurring and dissenting).

[30] Mitchell v. Helms, 530 U.S. 793, 867, 870-72 (2000) (Souter, J., dissenting).

[31] Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 175-80 (1992).

[32] See Levy, supra note 7, at 65-66 (citing historical evidence to support argument that no power is vested in Congress in realm of religion); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 922 (1986) ("The principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions."). R

of religious liberty, though they disagreed on how the theory ought to be applied to institutional arrangements of church and state.

Part III shows how the Lockean theory about the liberty of conscience underwrote the Establishment Clause itself. It argues that the members of the state ratifying conventions who proposed nonestablishment amendments, as well as those Framers whose views can be discerned, agreed that the Establishment Clause, at the very least, barred the federal government from supporting religion in a way that would coerce the religious beliefs of dissenters. Taxation of dissenters for religious purposes was at the heart of this conception. This Part's argument also undercuts the persistent neo-federalist or structuralist interpretation of the Establishment Clause, according to which the Clause's language was meant not only to stop Congress from legislating an establishment, but also to stop it from interfering with any state establishments.

Part IV investigates the possible constitutional implications that might be drawn from an understanding of the intellectual origins of the Establishment Clause. It examines some of the uses to which the history has been or might be applied in adjudication and politics and suggests ways in which a better grasp of history might advance or inhibit some of these uses. In particular, this Part considers and questions the view that the Establishment Clause only prohibits coercive government action, alongside the alternative view that the clause bars the use of taxes for religious purposes because such taxes coerce conscience.

This Article concludes with some observations about the usefulness of intellectual history, as opposed to institutional or legal history, for constitutional analysis. It suggests that almost any theory of constitutional interpretation, from originalist to evolutionary-historicist to primarily philosophical, must take seriously the lessons of the history of ideas.

I
The Origins of Liberty of Conscience: An Archeology

This Article argues that John Locke's version of the idea of liberty of conscience formed the basic theoretical ground for the separation of church and state in America. This argument requires differentiating what was original in Locke's views about liberty of conscience from the different views of his predecessors and contemporaries. In turn, this will allow this Article to demonstrate the primacy of a distinctively Lockean view in eighteenth-century America.

The easiest way to contextualize Locke's views would be to rely on a secondary source to explain the origins of the idea of liberty of conscience and its intellectual underpinnings. But it turns out that there is less in the historical literature than one might expect when it comes to the origin of the idea of liberty of conscience. The paucity of literature is surprising because liberty of conscience is such a fundamental part of modern conceptions of basic rights. It may be that scholars have not gone to great lengths to find out precisely where the idea of liberty of conscience came from because, today, the idea seems so intuitive.[33]

This Part begins the work of describing the origins of the idea of liberty of conscience in the West. It begins with the idea of conscience and then examines the way that idea came to be juxtaposed with the idea of liberty in the works of the foundational Protestant thinkers Martin Luther and John Calvin. This Part ends with Locke himself and his view of the liberty of conscience.

Unearthing the origins of the liberty of conscience thus calls for a short foray into the history of Christian thought. Although some of the material may, on the surface, appear unfamiliar to the contemporary legal mind, it is, in fact, concerned with basic questions of duty, obligation, and choice. Revealing the origins of the idea of liberty of conscience thus plays a vital role in the logic of this Article, but this history is also valuable in its own right for making sense of the tradition of classically liberal, rights-based thinking.

A. The Idea of Conscience

The idea of conscience has roots in early Christian thought. In the Vulgate, Jerome used the Latin term *conscientia*, already found in earlier Latin authors, to translate the Greek word *syneidesis*.[34] In a gloss to Ezekiel 1:14, Jerome spoke of something called by the Greek name *synteresis*, which he described as "that spark of the conscience [*scintilla conscientiae*] which was not quenched even in the heart of Cain when he was driven from paradise."[35] Jerome defined *synteresis*

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[33] There is one popular book in English on the subject: John L. Van Til, Liberty of Conscience: The History of a Puritan Idea (1992). The book touches on a few Puritan authors but does not fully trace the idea to its origins or offer a scholarly account of its development.

[34] Michael G. Baylor, Action and Person: Conscience in Late Scholasticism and the Young Luther, in 20 Studies in Medieval and Reformation Thought 1, 24 (Heiko A. Oberman et al. eds., 1977).

[35] See id. at 26 (translating S. Eusebius Hieronymus, Commentarium in Ezechielem Prophetam 22b, in 25 Patrologiae Cursus Completus, Series Latina (J.P. Migne ed., E.J. Brill, 1844-1864)). Jerome's gloss exerted a significant influence on the history of the idea of conscience.

as a faculty of the soul that made a person aware of his own sinfulness.[36] In Jerome's concept of *synteresis* lies the bare outline of our own idea of conscience: the human capacity to identify certain things as wrong.

Several other Church Fathers engaged the concept of conscience obliquely,[37] but it was Thomas Aquinas who, in the *Summa Theologica*, gave the idea of conscience the basic philosophic form that it maintained through the Middle Ages and well into the seventeenth century. Thomas took the idea of conscience from the Christian tradition[38] and grounded it in his Aristotelian schema of the human intellect.[39] For Thomas, conscience was an act of judgment, or practical reason, performed by the rational part of the soul to determine whether an action was good or bad. This act of judgment derived from a person's innate knowledge of natural law.[40] Because acting against conscience meant acting against one's apprehension of the

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[36] See id.

[37] Augustine understood conscience "as the element in human nature which stands before God and which, consequently, bears a divine-related authority in its power to command." Id. at 27. This conscience was, naturally, subordinate to divine decree. Peter Abelard entitled one chapter of his *Ethica*: "That there is no sin except against conscience." Peter Abelard, Ethical Writings: His *Ethics* or "*Know Yourself*" and His *Dialogue Between a Philosopher, a Jew and a Christian* 24 (Paul V. Spade trans., 1995). It follows from Abelard's view that to sin is to act against conscience. Abelard held that sin consisted in contempt of God, expressed by consenting to an action to which one believes consent should not be given. See Baylor, supra note 34, at 27-28. R

[38] The distinctively Christian origin of the idea of conscience for Thomas may be seen in the absence of the word conscience, or any translation of it, in Aristotle's own works or in the Islamic and Jewish philosophical traditions that received and interpreted Aristotle's works. It is always difficult to provide citation for a negative proposition. The claim here is that, while all the Aristotelian terminology inherited by Thomas finds analogues in Arabic and Hebrew Aristotelian sources, the term "conscience" has no technical equivalent in these sources. See, e.g., Herbert A. Davidson, Alfarabi, Avicenna, and Averroes, in Intellect: Their Cosmologies, Theories of the Active Intellect, and Theories of Human Intellect (1992); see also Shemu'el Ibn Tibbon's "Interpretation of Foreign Words" word list provided in the standard Vilna editions of Moses Maimonides, Guide for the Perplexed, translated into Hebrew by Shemu'el Ibn Tibbon.

[39] Thomas's account of the intellect may be found in St. Thomas Aquinas, Summa Theologica, Ia, questions 75-83 (Father Laurence Shapcote of the Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., 2d ed., Encyclopaedia Britannica, Inc. 1990) [hereinafter Summa Theologica]. The nature of synderesis is discussed at id., question 79, article 12 ("[*S*]*ynderesis* is said to incite to good, and to murmur at evil, inasmuch as through first principles we proceed to discover, and judge of what we have discovered."). Synderesis is also discussed in the context of natural law in Thomas's so-called Treatise on Law, found in Summa Theologica, supra, at Ia, IIae, question 94, article 1 ("*Synderesis* is said to be the law of our mind, because it is a habit containing the precepts of the natural law, which are the first principles of human actions.").

[40] The knowledge of natural law, for Aquinas, was the synderesis of which Jerome had spoken—synderesis was a habit of the soul. Summa Theologica, supra note 39, at Ia, question 79, art. 12; Ia, IIae, question 94, art. 1. R

right thing to do, it followed that to act against conscience was necessarily to sin.[41]

Nonetheless, it remained possible for conscience to err, either by misunderstanding the dictates of natural law, or by misunderstanding the specific circumstances of the action to be undertaken.[42] A person with an erroneous conscience was in a perplexing double bind: If he acted against conscience, he would sin, but if he acted in accordance with his erroneous conscience, that, too, would be sin.[43] Thomas resolved this difficulty by saying that a person whose ignorance was inevitable would be excused from sin when he acted on his erroneous conscience, but that one whose ignorance was voluntary would be held to have sinned in failing to inform himself and thereby repair his conscience.[44]

Even in Thomas's formulation it is already possible to see how the idea of liberty of conscience might later emerge. If it was sinful to act against conscience, then there might be reason to avoid requiring anyone to act against conscience. Yet the possibility of error in matters of conscience also raised a question of authority that Thomas did not directly address: Who could specify what conscience, in fact, required?[45]

B. Christian Liberty

Martin Luther took up the question of the authority of conscience in the context of his important idea of Christian liberty. Luther took the view that, by his sacrifice, Christ had liberated the faithful from the duty to obey the temporal law.[46] Christ also liberated the faithful from sin, in the sense that his sacrifice atoned for their sins and allowed them salvation despite their sinfulness.[47] Through these elements of what Luther called Christian liberty, Christ

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[41] Id. at Ia, IIae, question 19, art. 5; Baylor, supra note 34, at 53-54. R

[42] Summa Theologica, supra note 39, at Ia, IIae, question 19, art. 5. R

[43] Id.; Baylor, supra note 34, at 53-54. R

[44] Summa Theologica, supra note 39, at Ia, IIae, question 19, art. 5. R

[45] Later scholars debated whether conscience was a power, a faculty, or a habitus, and they disagreed about the precise relationship between conscience and synderesis, but otherwise, they preserved Thomas's basic conception of the place and function of conscience in the human intellect. See Baylor, supra note 34, at 70-118 (surveying views of later scholars on the nature of conscience). R

[46] Id. at 245 (citing Martin Luther, Lectures on Hebrews 2:15, in 57 D. Martin Luthers Werke [Works of Dr. Martin Luther] 135 (Weimar, 1883) [hereinafter Luther's Works]) ("[W]e have been freed from the law . . . ."); see also Martin Luther, Concerning Christian Liberty (R.S. Grignon trans.), in 36 The Harvard Classics 353, 369 (Charles W. Eliot ed., 1910) ("[T]o a Christian man his faith suffices for everything . . . he is certainly free from the law . . . .").

[47] Baylor, supra note 34, at 245. R

effected the liberation of the conscience.[48] That is, Christ liberated the conscience from the duty to obey the ceremonial law and from the condemnation of the faithful for sin when that sin had been forgiven.[49] It further followed that where God did not intend for certain laws to exist, observance of those laws was not binding upon conscience.[50] The conscience was to be bound by God's law alone.[51]

But how should one know the content of God's binding law? Here Luther's break with the Church became crucial. Luther insisted that only by reason and scripture could God's law be known. The received teachings of the Church were not to be considered determinative. This led Luther to the position he took at his famous audience with Charles V at the Diet of Worms. There, Luther was admonished to retract his radical views and, according to one report, "give up" his conscience.[52] Luther refused, explaining:

> Unless I am convinced by the testimony of Scriptures or by clear reason (for I do not trust either in the pope or in councils alone, since it is well known that they have often erred and contradicted themselves), I am bound by the Scriptures I have quoted and my conscience is captive to the word of God. I cannot and I will not retract anything, since it is neither safe nor right to go against conscience.[53]

In saying that it was wrong to act against conscience, Luther followed Thomas.[54] Thomas even would have agreed that conscience should rely upon natural reason, although the emphasis on scripture is distinctively Luther's. But, unlike Thomas, Luther insisted on the primacy of his individual judgment as to the true meaning of the teachings of Scripture and reason. The authority of the Church, in Luther's view, did not bind his conscience with respect to these matters.[55] It remains uncertain whether Luther believed that every individual ought to be able to exercise the same authority that he, Luther,

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48 Id. at 245-49.

49 Id.

50 Id.

51 Id.

52 Id. at 3 n.8 ("Depone conscientiam, Martin . . . .").

53 Id. at 1 (translating 7 Luther's Works, supra note 46, at 838). R

54 Luther did modify the scholastic view of conscience to include judgment, not only of particular acts, but of the whole person; he also understood conscience to include the affective, emotional aspect of the soul in addition to the intellectual. See id. at 251-52. While these modifications are significant for understanding Luther's thought, they do not directly relate to the question of acting against conscience.

55 Baylor argues that Luther's refusal to recant depended upon his conviction that his conscience was correct, although he was prepared to recant if he could be convinced that his views were wrong. Id. at 256-62.

was able to exercise as an educated and duly constituted priest.[56] But Luther certainly was denying the authority of the Church to bind his conscience. This was a profound break with Catholic teaching.

It did not immediately or necessarily follow from Luther's idea of liberty of conscience that every person should be able to choose religious beliefs, much less practices, for himself or herself. Liberation of the believer from the ceremonial law and from sin did not liberate the believer from the necessity of true faith. And the question of who should define true faith remained for the time unanswered. But the essence of what would become the broader idea of liberty of conscience had been born. If it was sinful to act against conscience, and if the individual himself could determine the content of his conscience based on scripture and reason, then the stage was set for the argument that the individual conscience was a matter purely for the individual.

C. Calvin's Version of the Liberty of Conscience

Through the English Puritans, Calvin's version of the liberty of conscience, not Luther's, made its way directly into the English-speaking world and to America, and so Calvin's explanation of the concept deserves our attention. Calvin, in his *Institutes*, articulated a vision of liberty of conscience that followed Luther's in its broad outlines. Calvin's view was more clearly and concisely stated, however, and it incorporated the predestinarian conception of salvation for which Calvin is famous. Like Luther, Calvin held that one task of the conscience was to evaluate whether the individual was saved or damned. But whereas in Luther's view it was possible that such an evaluation might spur one to faith and salvation, in Calvin's view this inquiry could not effect a change in the individual's state, because whether one was saved or damned was already predetermined by election.[57]

Calvin held that Christian liberty consisted of three parts, each related to conscience in some way. First, "the consciences of believers . . . should rise above and advance beyond the law, forgetting all law-righteousness."[58] This surprising formulation, so radically different from the Thomasistic idea that the conscience should be used to determine whether the believer's actions accorded with natural law,

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[56] Id.

[57] For a good general discussion of Calvin's doctrine of predestination, see J.K.S. Reid, Introduction to John Calvin, Concerning the Eternal Predestination of God 9 (J.K.S. Reid trans., Westminster John Knox Press 1997) (1552); see also John Calvin, Institutes of the Christian Religion 58-59 [3.22.7-4.1.17] (Ford Lewis Battles trans. & ann., William B. Eerdmans Publ'g Co. 1986) (1536) (explaining argument for predestination). (After the page number in the Battles edition, I have provided in brackets the cross-reference to the 1536 edition, as does Battles.)

[58] Calvin, supra note 57, at 176 [3.19.2]. **R**

resulted from Calvin's doctrine of election. All humans are sinners; none merit salvation through following the law;[59] the elect are saved only by God's mercy, despite their lack of merit.[60] The purpose of the law, therefore, is not to effect salvation by producing good works, nor to distinguish the saved wheat from the sinning chaff, but simply to exhort the saved to the sanctification of which they already partake.[61] This leads to what Calvin understood to be the second part of Christian liberty: The liberated conscience of the believer is not bound to follow God's law, but follows it willingly and through love.[62]

The third element of Calvin's Christian freedom was that believers are not bound by any "religious obligation to outward things of themselves 'indifferent.'"[63] The things "indifferent" to salvation, or *adiaphora*, are ceremonial practices relevant to religious practice but not required of the elect.[64] These indifferent things included, for Calvin, examples such as eating (or not eating) meat on Fridays; specific holidays; and wearing (or not wearing) priestly vestments.[65] None of these things was germane to salvation. Christ's sacrifice liberated the believer from concerning himself with such outward and inessential matters.[66]

Calvin's view of the spheres of ecclesiastical and civil government followed from his conception of Christian liberty. He attacked the Roman Church for erroneously identifying as necessary to salvation many things in fact indifferent to salvation.[67] The Church could, on Calvin's view, lay down rules for ecclesiastical order, so long as it kept the rules few and clarified that the rules were practical and not necessary to salvation.[68] But the Church lacked the authority to bind the consciences of the believers to things indifferent.[69]

Civil government, for its part, was no more entitled to make laws "according to [its] own decision concerning religion and the worship of God"[70] than was the ecclesiastical order. This did not mean that the civil government could not legislate at all with respect to religion. To the contrary, in addition to protecting the public peace and prop-

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59 Id. at 30 [27.3-5].
60 Id. at 37 [3.15.5].
61 Id. at 36 [2.7.14] ("[T]he law is an exhortation to believers.").
62 Id. at 177 [3.19.4].
63 Id. at 179 [3.19.7].
64 Id.
65 Id.
66 Id.
67 Id. at 190, 203 [4.8.14, 4.10.17, 4.10.10].
68 Id. at 204-05 [4.10.27-28].
69 Id.
70 Id. at 209 [4.20.3].

erty, good civil government "prevents idolatry, sacrilege against God's name, blasphemies against his truth, and other public offenses against religion from arising and spreading among the people."[71] Such a government is endorsed by God and merits complete obedience, as indeed does any government that strives for the general good.[72] Yet Calvin's emphasis on the divine sanction of good government was tempered by the requirement that "obedience is never to lead us away from obedience to him, to whose will the desires of all kings ought to be subject, to whose decrees their commands ought to yield, to whose majesty their scepters ought to be submitted."[73] Should civil government order anything at variance from God's desires, Calvin understood resistance and martyrdom to be the proper responses.[74] This is not yet the view that government ought never coerce conscience, but Calvin's view certainly implies that the citizen or subject possesses a sphere in which his beliefs are superior to those that might be imposed by the state. Liberty of conscience in the modern sense is not yet present, but its roots are visible.

D. William Perkins and the Development of the Calvinist Idea

Calvin's view of the liberty of conscience seems to have entered English discourse primarily through the writings of William Perkins, a Cambridge Puritan who taught and influenced the generation of Puritan divines who later went to Massachusetts Bay. In *A Discourse of Conscience*, Perkins followed Thomas in defining conscience as a natural power located in the faculty of practical reason, whose "propertie is to judge of the goodnes or badnesse of thinges or actions done."[75] Perkins then followed Calvin in arguing that "God hath now in the new Testament given a libertie to the conscience, whereby it is freed from all lawes of his owne whatsoever, excepting such laws and doctrines as are necessarie to salvation."[76]

Perkins went much further than Calvin, however, in explaining the consequences of this notion of liberty over indifferent things. Perkins set out to argue, against what he took to be the Catholic view, that laws enacted by ecclesiastical and civil authorities lacked power to bind conscience. By "binding conscience," Perkins meant very sim-

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71 Id. at 208 [4.20.3].

72 Id. at 220-21 [4.20.23].

73 Id. at 225 [4.20.32].

74 Id. at 225-26 [4.20.32].

75 William Perkins, A Discourse of Conscience, in William Perkins: 1558-1602: English Puritanist 1, 5 (Thomas F. Merrill ed., 1966) (1608).

76 Id. at 31.

ply "binding every sinner to the punishment of everlasting death."[77] A law binding conscience was a law one must follow or be damned.[78] The core of Perkins's argument was that only God, and not humanity, possessed the power to damn or save.[79] If only God could damn or save, and if binding conscience meant making a law that would effectuate or prevent salvation, it followed that only God could bind conscience. To this theological argument Perkins added a scriptural support, James 4:12: "There is one lawgiver that can save or destroy."[80]

For Perkins, as for Calvin, the subjects of laws could be divided into things indifferent and things necessary for salvation. With respect to things indifferent, it seemed obviously "absurd to thinke that God gives libertie in conscience from any of his own laws, & yet will have our consciences still to remaine in subjection to the lawes of sinnefull men."[81] Because in the area of indifferent things God has chosen, through Christ's sacrifice, not to bind conscience, it follows that human laws cannot bind with respect to indifferent things.

With respect to those things necessary for salvation, on the other hand, where God's law *does* bind conscience, it would be equally strange to think that human laws could have any binding effect. It was evident from Scripture that "no man can prescribe rules of God's worship, and humane lawes, as they are humane lawes, appoint not the service of God."[82] Only God could bind conscience with respect to things necessary for salvation, and human law therefore could say nothing at all with respect to salvation.[83]

From the view that human laws could not bind conscience, it did not follow that human laws ought not be obeyed. To the contrary, Perkins explained that human laws generally mandated obedience. With respect to things indifferent, Perkins followed Calvin in holding

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[77] Id. at 22.

[78] This definition followed the understanding of liberty of conscience derived from Luther and Calvin. When they wrote that Christ freed the conscience from the ceremonial law and its rigors, they meant that prior to Christ's advent, a sin against the ceremonial law could mean damnation. Freedom in things indifferent meant that one could now act freely with respect to those things and yet still be saved in Christ.

[79] Perkins, supra note 75, at 30. R

[80] Id.

[81] Id. at 31.

[82] Id. at 30.

[83] Perkins made a number of other arguments to support his position. One is worth mentioning because it became associated closely with John Locke, to whom it is sometimes attributed: That civil government could not bind conscience because it is impossible successfully to command belief. "[I]f it were possible for our governours by lawes to command mens thoughts & affections, then also might they commaund conscience: but [this] is not possible, for their lawes can reach no further then the outward man, that is, to body and goods, with the speeches & deeds thereof . . . ." Id. at 31.

that God's law generally ordained the magistrate's authority. "[W]holesome laws," such "as are not against the laws of God, and withall tend to maintaine the peaceable estate and common good of men,"[84] ought to be followed. In fact, to violate such laws constituted "sin before God."[85] With respect to things necessary to salvation, human laws sometimes correspond to things commanded by God; when they do, they must be followed, "not because they were enacted by men, but because they were first made by God."[86]

Yet the fact that human laws did not of themselves bind conscience did have one major consequence for following human laws: "[H]umane lawes binde not simply of themselves, but so farre as they are agreable to Gods word, serve for the common good, stand with good orders, and hinder not the libertie of conscience."[87] Thus, "if it should fall out that mens lawes be made of things that are evill and forbidden by God, then is there no bond of conscience at al."[88] Here the stakes of the liberty of conscience become clear. As a consequence of the liberty of the conscience bought by Christ's sacrifice, civil government and ecclesiastical authorities alike lack the authority to make laws that bind in themselves. All human laws, therefore, must be examined to determine to what degree they conform to divine sanction and thus bind the conscience.

E. "Liberty of Conscience" in Seventeenth-Century England and America

Perkins himself did not directly relate his argument to the question of government toleration of religious difference. But within a few years of the publication of his *Discourse*, arguments for toleration couched in terms of the liberty of conscience appeared in Baptist pamphlets. The pamphlets differed significantly from Perkins in their general theology, but their arguments were nonetheless reminiscent of his. They made the same basic point that the king's law, being human, cannot compel or provide assurance regarding matters of faith; and some even cited the same scriptural verse, James 4:12, to prove the point.[89] To this they added an argument with which Perkins likely

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[84] Id. at 33.

[85] Id.

[86] Id. at 34.

[87] Id.

[88] Id.

[89] See, e.g., Persecution for Religion Judg'd and Condemn'd (1615), reprinted in Tracts on Liberty of Conscience and Persecution: 1614-1661, at 83, 99 (Edward Bean Underhill ed., London, Hadley Press 1846) [hereinafter Tracts on Liberty of Conscience] ("*There is but one Lord*, and *one Lawgiver*, over his church."); see also Religions Peace: Or a Plea for Liberty of Conscience (1646), reprinted in Tracts on Liberty of Conscience, supra, at 1,

would have agreed also, namely that worship offered without faith necessarily was sinful.[90] From these two arguments it followed that a human law requiring church attendance by one whose conscience rejects that attendance effectively required the subject to commit the sin of hypocrisy.[91] The Baptist pamphleteers agreed with Perkins in their basic understanding of what liberty of conscience was. They went further than Perkins, however, in their conclusion that no one ought to be compelled to perform any religious acts. Perkins had said nothing on this score.

Mid-seventeenth-century English Puritans also believed in liberty of conscience, and they furthermore agreed that one should not act against one's conscience. Their position on liberty of conscience can be seen in the laboriously negotiated doctrinal document known as *The Westminster Confession*.[92] The twentieth chapter of the *Confession*, entitled "Of Christian Liberty, and Liberty of Conscience," first made it clear, in terms that Perkins would have endorsed, that human law had force only where compatible with God's word or where related to things indifferent: "God alone is Lord of the Conscience, and hath left it free from the Doctrines and Commandments of men, which are in any thing contrary to his Word; or beside it, [in] matters of Faith, or Worship."[93] This formulation did not differ from the Baptists' first premise.[94] As a result, the *Confession* stated, it would be wrong to obey human laws that contravened God's word: "[T]o believe such Doctrines, or to obey such Commands out of Conscience, is to betray true Liberty of Conscience . . . ."[95] Here, too, the Baptists would have recognized the medieval view that acting against con-

17-18 ("[N]o king nor bishop can, or is able to command faith . . . . You may force men to church against their consciences, but they will believe as they did afore, when they come there . . . ." (footnote omitted)).

[90] See, e.g., Persecution for Religion Judg'd and Condemn'd, supra note 89, at 104 ("[I]f I cannot offer [prayer] up with my spirit, it is not acceptable to God, but most abominable."). R

[91] See, e.g., id. at 105 ("[I]f the intent of the law were to make me come to church to worship God, and not of faith, [then] the intent of the law were to compel me to sin . . . .").

[92] The Confession of Faith, Together with the Larger and Lesser Catechismes. Composed by the Reverend Assembly of Divines, Sitting at Westminster, Presented to Both Houses of Parliament (London, Co. of Stationers 1658) [hereinafter Westminster Confession]. *The Westminster Confession* was collectively authored by the Westminster Assembly (1643-1652). The Assembly was dominated by many Presbyterians, who were Puritans in the broad seventeenth-century sense of the term. The more radical Puritans of New England, by contrast, were almost exclusively Congregationalists, not Presbyterians.

[93] Id. ch. XX, § II, at 63 (footnotes omitted).

[94] And indeed, the marginal notation of scriptural sources in the 1658 edition cited James 4:12, the same prooftext used by both Perkins and some Baptist pamphleteers. Id. at n.k.

[95] Id. at 63 (footnote omitted).

science is sin. Finally, the *Confession* concluded that "the requiring of an implicite Faith, and an absolute and blinde obedience, is, to destroy Liberty of Conscience, and Reason also."[96]

Yet this strong statement in favor of the liberty of conscience and against coercion was not understood to mean that all dissenters should be free from punishment by civil and ecclesiastical authorities. The Confession went on to explain that liberty of conscience did not permit escape from the enforcement of legitimate law, whether religious or otherwise:

> They, who upon pretence of Christian Liberty, shall oppose any lawful Power, or the lawful exercise of it, whether it be Civil or Ecclesiastical, resist the Ordinance of God. And, for their publishing of such Opinions, or maintaining of such practices, as are contrary to the light of Nature, or to the known Principles of Christianity; whether concerning Faith, Worship, or Conversation, or to the Power of Godlinesse; or, such eroneous Opinions or practices, as either in their own nature, or in the manner of publishing or maintaining them, are destructive to the external Peace and Order which Christ hath established in the Church, they may lawfully be called to account, and proceeded against by the Censures of the Church, and by the power of the Civil Magistrate.[97]

The English Puritans were willing to take a strong stand in favor of the theoretical idea of the liberty of conscience. But they also saw nothing in the idea of liberty of conscience to preclude punishing and suppressing erroneous doctrine. For them, liberty of conscience did not necessarily mandate any strong form of religious toleration.

A similar, contemporaneous view of the compatibility of liberty of conscience and suppression of religious dissent appears in John Cotton's side of his vehement exchange with Roger Williams over the liberty of conscience in the middle of the seventeenth century in New England.[98] Both parties claimed to adhere to the doctrine of liberty of conscience. In the first book of the exchange, written some years after his expulsion from Massachusetts Bay for heterodoxy, Williams claimed that the influential Cotton had, in a private letter reproduced

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[96] Id. at 63-64 (footnote omitted).

[97] Id. ch. XX, § IV, at 64-66 (footnotes omitted).

[98] The exchange began with Roger Williams, The Bloudy Tenent, of Persecution, for Cause of Conscience (1644), reprinted in 3 The Complete Writings of Roger Williams (Samuel L. Caldwell ed., photo. reprint 1963) [hereinafter Bloudy Tenent of Persecution]; the response was John Cotton, The Bloudy Tenent, Washed, and Made White in the Bloud of the Lambe (London, Hannah Allen 1647); Williams replied once more with Roger Williams, The Bloody Tenant Yet More Bloody (1652), reprinted in 4 The Complete Writings of Roger Williams, supra [hereinafter Bloody Tenant Yet More Bloody]. All the texts were published in London.

by Williams, opposed liberty of conscience.[99] Williams's text set out to condemn and refute the view he attributed to Cotton. In a lengthy response that engaged Williams's argument line by line, Cotton denied the charge.[100] He explained that he condemned persecution for cause of conscience.[101] He believed, rather, that the government could, and indeed must, require a person suffering from mistaken conscience to reexamine his beliefs and reach the correct result with respect to things necessary for salvation.[102] The government also certainly could prohibit the mistaken person from spreading his erroneous and dangerous views.[103] "It is not lawfull to persecute any for Conscience sake rightly informed," Cotton averred.[104] But if, after repeated admonition, a person refused to hear reason, it could be concluded that such a person was suffering from an erroneous conscience.[105] Once this had been determined, it followed that it was perfectly appropriate to punish the dissenter—not for following conscience, but for acting against his *own* conscience, an act which certainly was a sin.[106]

According to Cotton, it was appropriate to use physical punishment or banishment to bring about the sinner's reexamination of his conscience and the prevention of the spread of destructive doctrines, provided the sinner actually was holding his views in such a way as to harm civil peace.[107] Punishment or banishment did not, of itself, violate the liberty of conscience.[108] Cotton implicitly acknowledged that the individual's internal conscience could not be directly changed by the state,[109] nor would it do any good for the salvation of the soul unless the believer came to accept the truth in his own conscience.

Cotton's view, like that of *The Westminster Confession*, was a plausible reading of Perkins on the liberty of conscience. When human laws with respect to things necessary for salvation corre-

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[99] Cotton's letter was set out in the Bloudy Tenent of Persecution, supra note 98, at 41-53. Williams's title for Cotton's letter described it as "Professedly mainteining Persecution for Cause of Conscience." Id. at 41. Williams also claimed that Cotton had said that only those who truly fear God are entitled to liberty of conscience. Id. at 213-14. R

[100] See Cotton, supra note 98, at 183-84. Cotton flatly denied having said that only the God-fearing should enjoy liberty of conscience. Id. R

[101] Id. at 21-22.

[102] Id. at 26-27.

[103] See id. at 50-51 ("[A] little leaven (so tolerated) [may] leaven the whole lumpe[.]"); id. at 67 (citing Old Testament precedent for executing heretics and idolaters).

[104] Id. at 22.

[105] Id. at 26-27.

[106] Id. at 27.

[107] Id. at 3, 10-13.

[108] Id. at 3.

[109] See id. at 23 ("It is not lawfull to persecute any for Conscience sake . . . for in persecuting such, Christ is persecuted . . . .").

sponded to divine laws, they ought to be enforced. Cotton was confident that the laws of Massachusetts so corresponded. He did not claim that violating human law would bring about damnation. He simply held that human government should attempt to cure mistaken conscience.

Williams, for his part, like the English Baptist pamphleteers, was adamant that punishment for dissenters amounted to denial of liberty of conscience. It is possible that this view was gaining some purchase in the mid-seventeenth century. A London pamphlet of 1644, simply entitled *Against Universall Liberty of Conscience*, took a view that was in substance not dissimilar from Cotton's but notably was willing to grant that this position opposed what the anonymous author called "universal" liberty of conscience.[110] In the pamphlet, the writer argued that with respect to things necessary for salvation, "an unpartiall, free, unmuzzled tryall of truth" was inappropriate.[111] It could not be "granted, without enduring blasphemy, and hazarding many soules."[112] Another, better known New England pamphlet of 1645 also came out against what it called liberty of conscience.[113]

Yet even this author, with his unashamed title, hastened to explain that he did not favor *compelling* conscience.[114] He noted that, although it certainly was sinful for anyone to act against conscience, it was also sinful "to act according to that erroneous conscience."[115] Thus, when it should be determined by the authorities that a person was suffering from an erroneous conscience, then the authorities must force the person to take instruction to correct his own conscience and to avoid "infecting others" with his dangerous opinions.[116] Like Cotton, the pamphleteer held that one could oppose toleration without coercing conscience. Unlike Cotton, the pamphleteer was willing to concede that the expression "liberty of conscience" could be used to mean something very much like "religious toleration." In the writ-

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110 Against Universall Libertie of Conscience: Being Animadversions upon Two Letters Written to a Friend Pleading for It 2 (London, Thomas Underhill 1644) ("An Universall liberty of Conscience, is an universall liberty to Sin . . . to damne ones own soule irrecoverably . . . and to hazard . . . the damnation of multitudes of others . . . .").

111 Id. at 7.

112 Id.

113 See Nathaniel Ward, The Simple Cobler of Aggawam in America 14 (P.M. Zall ed., Univ. Neb. Press 1969) (1645) ("It is said, That Men ought to have Liberty of their Conscience, and that it is persecution to debarre them of it: I can rather stand amazed then reply to this: it is an astonishment to think that the braines of men should be parboyl'd in such impious ignorance . . . .").

114 Id. at 3 ("The punishment is not to compell to put away or *deny Conscience*, but . . . of Instruction to *satisfie Conscience* . . . .").

115 Id. at 6.

116 Id.

ings of John Locke, the association between liberty of conscience and toleration became even closer, and the two terms gradually began to be used almost synonymously.

F. Onward to Locke

Locke, writing at the end of the seventeenth century, developed the argument for liberty of conscience by refining the idea of separate spheres of authority for religious and worldly affairs that could be heard faintly in Perkins's *Discourse of Conscience*[117] and more clearly in some of the Baptist pamphlets.[118] In *A Letter Concerning Toleration*, Locke advanced the argument, developed later in the *Two Treatises of Government*, that the commonwealth is composed by its members solely for the civil interests of life, liberty, and property and therefore has no jurisdiction over matters falling outside these interests.[119] Once this view is accepted, it follows that civil government cannot interfere with matters of religion except to the extent necessary to preserve civil interests.[120] Locke offered two arguments to justify the all-important claim that "the care of souls is not committed to the civil magistrate."[121] First, God had never given any person authority "to compel any one to his religion."[122] The commonwealth's religious authority, therefore, could not be directly divine. Locke had in mind the view that there was no express scriptural assignment of such power in the Christian sphere. Although the ancient Jewish commonwealth had been a theocracy, nonetheless, "there is absolutely no such thing, under the Gospel, as a Christian commonwealth."[123] This scriptural argument recurred regularly in the Baptist pamphlets, which insisted that God alone possesses authority in matters spiritual.[124]

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[117] See Perkins, supra note 75, at 31-32 ("[A]nd the end [of man's laws], is not to maintaine spiritual peace of conscience, which is between man and God, but onely that externall and civil peace which is betweene man and man."). R

[118] See, e.g., Religions Peace, supra note 89, at 23 ("Kings and magistrates are to rule temporal affairs by the swords of their temporal kingdoms, and bishops and ministers are to rule spiritual affairs by the word and Spirit of God . . . and not to intermeddle one with another's authority, office, and function."). R

[119] John Locke, A Letter Concerning Toleration, reprinted in John Locke: A Letter Concerning Toleration in Focus 12, 17-18 (John Horton & Susan Mendus eds., 1991) [hereinafter A Letter Concerning Toleration]; John Locke, Two Treatises of Government 382 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[120] Cf. Dunn, supra note 18, at 30 (arguing that *A Letter Concerning Toleration* focuses on criteria for legitimate exercise of power). R

[121] A Letter Concerning Toleration, supra note 119, at 18. R

[122] Id.

[123] Id. at 40.

[124] See Persecution for Religion Judg'd and Condemn'd, supra note 89, at 99; Religions Peace, supra note 89, at 17-18, 23. R R

Second, Locke argued that power to compel in matters of religion could not be conferred upon a magistrate by consent of the people, because "no man can, if he would, conform his faith to the dictates of another."[125] This was so partly because it is impossible to grant to another the power to make one believe any one thing.[126] It was also because even if one were to grant to another the power to prescribe the forms of outward worship, practicing and professing an outward form which one believed not to be true would constitute "great obstacles to our salvation."[127] To offer such worship would be to commit the sins of hypocrisy towards God and "contempt of his Divine Majesty."[128] The invocation of contempt suggests the idea, going back to Thomas, that it is sinful to act against conscience.[129] Indeed, at another point in *A Letter Concerning Toleration*, Locke made clear the association between the primacy of conscience and the impossibility of coercion:

> No way whatsoever that I shall walk in against the dictates of my conscience, will ever bring me to the mansions of the blessed. . . . In vain, therefore, do princes compel their subjects to come into their church-communion, under pretence of saving their souls. . . . [W]hen all is done, they must be left to their own consciences.[130]

Two points are worth noting about this second argument for the illogic of the civil magistrate possessing authority to compel in matters of religion.[131] First, Locke's argument depends on the unstated as-

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[125] A Letter Concerning Toleration, supra note 119, at 18. **R**

[126] Id. This argument could also be heard in the Baptists' pamphlets. See Religions Peace, supra note 89, at 17 ("[A]s kings and bishops cannot command the wind, so they cannot command faith . . . ."). **R**

[127] A Letter Concerning Toleration, supra note 119, at 18. **R**

[128] Id.

[129] Locke made the reference to the sin of acting against conscience explicit in a later response to his critic Jonas Proast: "Not to kneel at the Lord's Supper, God not having ordained it, is not a sin . . . . But to him that thinks kneeling is unlawful, it is certainly a sin." John Locke, A Third Letter for Toleration: To the Author of the Third Letter Concerning Toleration, reprinted in 6 The Works of John Locke 330 (3d ed., London, W. Otridge & Son 1812). Locke's point is that with respect to a thing indifferent, like the ritual custom of kneeling at communion, there is no obligation in conscience. But by contrast, the moment one believes—however incorrectly—that kneeling is not indifferent, then violating that belief constitutes a sin. The choice of the example of an indifferent thing emphasizes that even where some action is not necessary to salvation, one could still commit a sin by violating one's own conscience.

[130] A Letter Concerning Toleration, supra note 119, at 32. **R**

[131] This is the argument that is sometimes called Locke's "argument from belief." See, e.g., Richard Vernon, The Career of Toleration: John Locke, Jonas Proast, and After 17-34 (1997) (presenting Locke's argument from belief and Proast's critique of it); see also Dunn, supra note 18, at 33 & n.1 (discussing Locke's argument that religious conviction cannot be compelled by government). Jeremy Waldron has criticized the argument from belief in terms that draw on Locke's seventeenth-century critic, Jonas Proast. See Jeremy Waldron, **R**

sumption that the individual's conscience begins as his own and cannot be compelled unless he gives his consent for its compulsion. Because a person would never give such assent, his conscience remains his own. Locke does not state the basis for assuming that conscience belongs to the individual, but one can infer that he has in mind something akin to the view of Perkins and *The Westminster Confession*: God is Lord of conscience, and Christ liberated the individual conscience so that no human law could bind conscience with respect to things indifferent. Locke's adoption of the view that the person has a preexisting right over his conscience, assigned by God, helps to explain his statement that "liberty of conscience is every man's natural right."[132] Although for Locke liberty of conscience began as a specific dispensation of Christian liberty,[133] it came to be conceived as a natural right alongside the others in the Lockean pantheon.

The second noteworthy aspect of Locke's argument lies in the substance of his view that a person would never alienate to another the authority to compel his own conscience. This claim depends on Locke's reception of the traditional view that it is sinful to act against conscience. Locke put this view in two ways. First: "No way whatsoever that I shall walk in against the dictates of my conscience, will ever bring me to the mansions of the blessed."[134] Second: "Whatsoever is not done with that assurance of faith, is neither well in itself, nor can it be acceptable to God. To impose such things, therefore, upon any people, contrary to their own judgment, is, in effect, to command them to offend God . . . ."[135] Locke did not argue directly that the magistrate would himself sin by compelling others to act against conscience, although he says that the magistrate lacks the authority to enforce any religious ceremonies.[136] Instead, he maintains that it would make no sense for a person to grant to another the power to compel him to act against conscience because (1) it is impossible to

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Locke: Toleration and the Rationality of Persecution, in John Locke: A Letter Concerning Toleration, supra note 119, at 98, 115-19. Waldron's core criticism of Locke is that Locke neglects the possibility that coerced practice might lead to the formation of correct beliefs. But as the reading of Locke presented in this Article suggests, Locke has a response to this charge: Coercing practice causes the coerced person to act against conscience, which is necessarily sinful. The coercing magistrate thus compels the individual to sin, which cannot lead to salvation. Waldron's neglect of the religious component of Locke's argument leads him to ignore this response to his (and Proast's) charge. R

132 A Letter Concerning Toleration, supra note 119, at 47. R

133 Cf. id. at 39 (explaining that under law of Moses, before Christ's dispensation, "idolaters were to be rooted out").

134 Id. at 32.

135 Id. at 33.

136 Id.

grant another the power to change one's mind,[137] and (2) it is sinful to act against conscience. If one were to reject the received view that it is wrong to act against conscience, then there would be no particular reason to deny that the individual could grant to the commonwealth power to exercise authority over affairs of religion. The connection between liberty of conscience and the exercise of rationality was implicit in Locke's argument that liberty of conscience related to the "care . . . of every man's soul," which "belongs unto himself, and is to be left unto himself."[138] The care of one's soul entailed the exercise of human reason, even though that reason must be directed towards forming true beliefs.

The familiar dichotomy of reason and faith did not seem to Locke a contradiction.[139] In his *Essay Concerning Human Understanding*, he argued that "Reason leads us to the Knowledge of this certain and evident Truth, That *there is an eternal, most powerful, and most knowing Being*; which whether any one will please to call *God*, it matters not."[140] Armed with this proposition, Locke further explained in a chapter on "Faith and Reason" that faith had to do only with matters of revelation,[141] and that in such matters, revelation might confirm the dictates of reason, "yet cannot in such Cases, invalidate its Decrees."[142] This led to the conclusion that one could never be obliged to abandon reason for something contrary to it "under a Pretence that it is Matter of Faith."[143] Thus, for Locke, it was entirely logical to

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137 In addition to the appearance of a simple version of this view in the Baptist pamphlets, see supra notes 89-91 and accompanying text, Locke could have found a more sophisticated and theorized version of this view in Benedict Spinoza. See 1 John Plamenatz, Man and Society: Political and Social Theories from Machiavelli to Marx 130-33 & 133 n.1 (2d ed. 1992) (discussing Spinoza's advocacy of man's freedom to reason and liberty of conscience). Locke had lived in exile in Holland, where Spinoza lived and wrote, and in addition, Spinoza's "Tractatus Theologico-Politicus" had gained enough attention in England to merit an English translation as early as 1689. See Benedictus de Spinoza, A Treatise Partly Theological, and Partly Political (London, 1689). For an early view on the relationship between Locke and Spinoza, see generally William Carroll, A Dissertation upon the Tenth Chapter of the Fourth Book of Mr. Locke's Essay, Concerning Humane Understanding. Wherein That Author's Endeavours To Establish Spinoza's Atheistical Hypothesis, More Especially in That Tenth Chapter, Are Discover'd and Confuted (London, 1706). **R**

138 A Letter Concerning Toleration, supra note 119, at 28. **R**

139 See John Locke, An Essay Concerning Human Understanding 687 (Peter H. Nidditch ed., Oxford Univ. Press 1979) (1690) ("*Faith* is nothing but a firm Assent of the Mind: which if it be regulated, as is our Duty, cannot be afforded to any thing, but upon good Reason; and so cannot be opposite to it.").

140 Id. at 621.

141 Id. at 693.

142 Id. at 693-94.

143 Id. at 694.

connect liberty of conscience to rational activity. His argument for liberty of conscience was at once religious and rationalist.

Locke's dependence on religious arguments, grounded in reason, for liberty of conscience sets the stage to revise the received wisdom that there existed in late eighteenth-century America distinct Puritan, evangelical, and enlightened views of liberty of conscience. Locke himself, who is typically thought to be the progenitor of the "enlightened" view, understood liberty of conscience in terms that were continuous with and relied upon the arguments of Puritans and Baptists. Locke did not reject, or even minimize, the religious basis for his arguments. To the contrary, his views in *A Letter Concerning Toleration* fully incorporated religious premises and arguments.

II
Locke on Liberty of Conscience in America

Since Mark DeWolfe Howe's influential reconsideration of the role of evangelical Christians in arguments for religious liberty in colonial America,[144] it has become standard in the academic literature to identify several competing strands of thought about church-state relations that form the background of the religion clauses.[145] The most prominent and fully discussed of these are the Puritan, evangelical,

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[144] Howe, supra note 12. For a discussion of the rise of Howe's influence, see Kurland, supra note 7, at 859-60. R R

[145] An early exponent of the contrast between pietism, associated with Isaac Backus, and Jeffersonian rationalism was William G. McLoughlin, Isaac Backus and the Separation of Church and State in America, 73 Am. Hist. Rev. 1392 (1968). For more recent, slightly different accounts, see McConnell, supra note 13, at 1438-43, which contrasts rationalist, evangelical, and civic republican views in church-state relations; and Arlin M. Adams & Charles J. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 1582-87, 1591-94 (1989), which discusses "enlightenment" and "pietistic" separationists. R

Many academic sources follow Howe in contrasting Roger Williams's views with those of Madison and Jefferson. The contrast is misplaced in the context of the debate over the Establishment Clause, because Williams's pre-Lockean views simply were not an important part of the debate in the framing of the Establishment Clause or in the years leading up to it. Isaac Backus occasionally alluded to Williams, but he quoted him just once in all his pamphlets on liberty of conscience, and otherwise did not resuscitate much of his argumentative substance. See Isaac Backus, An Appeal to the Public for Religious Liberty (Boston, 1773), reprinted in Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789, at 322 (William G. McLoughlin ed., 1968) [hereinafter McLoughlin, Backus on Church, State, and Calvinism]. Some of the standard sources comparing Williams to Jefferson and Madison are collected in Adams & Emmerich, supra, at 1564-66; Berman, supra note 8, at 783 & n.22; Robert M. Cover, The Supreme Court, 1982 Term: Foreword—*Nomos* and Narrative, 97 Harv. L. Rev. 4, 19 (1983); Timothy L. Hall, Roger Williams and the Foundations of Religious Liberty, 71 B.U. L. Rev. 455, 456 n.6 (1991) (citing Laurence Tribe, American Constitutional Law 1158-59 (2d ed. 1988)); Philip B. Kurland, The Religion Clauses and the Burger Court, 34 Cath. U.L. Rev. 1, 3 (1984). R

and enlightened strands.[146] The Puritan strand is associated with New England and usually is thought to entail a nominal division between church and state, coupled with a close relation between the two.[147] The evangelical (sometimes called pietist) strand is said to be motivated by a concern for the purity of religion and to focus on the dangers that establishment posed to the established religion itself.[148] The enlightenment strand (sometimes also called Deistic) is thought to focus on the harm that an established religion could cause the state itself. Under the influence of the Pocockian moment in the American legal academy in the 1980s,[149] some writers have even identified a civic republican strand, which is thought to have emphasized the importance of religion in maintaining civic and republican virtue.[150]

This taxonomy has done a disservice to clear thinking about the emergence of the Establishment Clause, in that it obscures the broad agreement in postrevolutionary America on a Lockean concept of liberty of conscience. In the seventeenth century, of course, there were serious differences among colonial thinkers with respect to the scope

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146 See, e.g., Witte, supra note 13, at 377-88 (discussing Puritan, evangelical, enlightenment, and civic republican views on church-state relations in late eighteenth century). R

147 Id. at 378-80.

148 See id. at 381-83; Howe, supra note 12, at 6. See generally 1-2 William G. McLoughlin, New England Dissent 1630-1833: The Baptists and the Separation of Church and State (1971) [hereinafter McLoughlin, New England Dissent]. The term "pietist" is favored by McLoughlin, who also calls this strain "theocentric." See William G. McLoughlin, Introduction to McLoughlin, Backus on Church, State, and Calvinism, supra note 145, at 1, 47 [hereinafter McLoughlin Introduction]. Although the term "evangelical" is often used to describe Baptists like Isaac Backus and John Leland, see, for example, Witte, supra note 13, at 381, it should be noted that this term applied to preachers who placed emphasis on the conversion experience as an affective event. Backus, for example, was strictly Calvinist and a follower of Jonathan Edwards in matters of theology. Backus's theological/spiritual heritage was that of a New Light Separatism that developed into Baptism without losing its predestinarian cast. His gradual adoption of the antipedobaptist position (insisting on adult, not child, baptism) made him a "Baptist" but did not necessarily make him an evangelical. McLoughlin Introduction, supra, at 3-9 (reviewing Backus's religious path, including his adoption of antipedobaptist beliefs). Nor was Roger Williams a Baptist for more than a very brief time. See id. at 18. Baptists did, however, become increasingly evangelical in the nineteenth century. R R R

149 In the wake of Pocock's *Machiavellian Moment*, renewed interest in "civic republicanism" began to affect both the historiography of the early republican period and the political theory of American constitutional thought. Seminal works in this genre include Frank I. Michelman, The Supreme Court 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986) (drawing on and criticizing civic republican tradition of self-government and assessing its resurgence); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985) (calling for revival of aspects of civic republican tradition).

150 See McConnell, supra note 13, at 1441 (arguing that republican political theory "conflicted" with "political theory of the advocates of free exercise"); Witte, supra note 13, at 385-88 (describing civic republican view); supra text accompanying notes 15-16; see generally Kidd, supra note 16 (arguing for strand of civic theology in "revolutionary" America). R R R R

of religious liberty. Roger Williams, we have seen, famously disagreed with the eminent Puritan John Cotton about the nature of the liberty of conscience.[151]

Differences of ideology and policy among colonial regions also contributed to very different institutional church-state arrangements. The Congregationalist New England Way, which provided for compelled taxation to support local ministers (subject to certain exceptions, about which more will be said later), differed markedly from the nonestablishment policies of Rhode Island and Quaker Pennsylvania. Both differed from the Anglican establishments of the southern colonies, and these differed in certain aspects from the spottier Anglican establishments in New York and New Jersey.[152]

In the later eighteenth century, however, things changed. Notwithstanding persistent institutional differences and a history of intellectual disagreement, by the late eighteenth century it was broadly agreed in the colonies that there was a basic, indeed natural, right called "liberty of conscience." Nearly every recorded argument made in the founding generation invoked liberty of conscience as the key principle underlying the proper arrangement of church-state relations. Lockean liberty of conscience appeared centrally in arguments made by the New England elites who had inherited the New England Way, by the New Light, Baptist clergy who came out of the Great Awakening of the 1740s, and by rationalist Deists. This was true of arguments made before, during, and after the composition of the religion clauses.

Different eighteenth-century proponents of the liberty of conscience sometimes had very different theological views from one another. The New England Baptist and activist Isaac Backus, for example, was the very model of an unreconstructed Calvinist in the tradition of Jonathan Edwards. He believed in predestination and offered biblical prooftexts for his arguments.[153] By contrast, Thomas Jefferson was notoriously a Deist who followed the religion of reason and relied on its language to support his claims. Yet for the purposes of this Article, the crucial datum about Backus and Jefferson on liberty of conscience is that they made *the very same Lockean arguments* for similar programs of toleration. Despite being at opposite ends of the theological spectrum, the predestinarian and the deist used the same theoretical framework and logic to explain why liberty of con-

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151 See supra text accompanying notes 98-100. R

152 See McConnell, supra note 13, at 1421-30 (sketching approaches to church-state relations in various colonies); see also David Hackett Fischer, Albion's Seed: Four British Folkways in America 795-96 (1989) (delineating various religious denominations in "British America"). R

153 See generally McLoughlin, Backus on Church, State, and Calvinism, supra note 145. R

science was the appropriate course. The two rhetorical strategies differed, but the intellectual core was surprisingly and tellingly common to both.

A. The Emergence of Lockean Liberty of Conscience

As we saw in Part I, in Puritan New England in the first three-quarters of the seventeenth century, "liberty of conscience" was a contested idea. One famous New England pamphlet of 1645 actually rejected liberty of conscience outright as a foolish doctrine.[154] Roger Williams, very much a peripheral figure who ultimately was exiled from Massachusetts Bay Colony, thought that liberty of conscience required toleration of religious difference,[155] while Williams's interlocutor, John Cotton, professed to believe in liberty of conscience and thought that such liberty was compatible with correction of religious errors by expulsion or punishment.

But the meaning of liberty of conscience shifted subtly in New England, and the view that liberty of conscience either was misguided or permitted persecution gradually faded. In 1673, an election sermon could still describe "unbounded Toleration as the first born of all *Abominations*."[156] But by the last decade of the seventeenth century, the degree of toleration had increased markedly throughout New England. Limited legal toleration of dissent was soon to become the law. The Massachusetts Charter of 1691 formally granted liberty of conscience to all Christians except Catholics.[157]

In his 1692 election sermon, Cotton Mather echoed the new Massachusetts Charter in proposing a limitation on persecution, saying that he "would humbly put in a Bar against the *Persecution* of any that may conscientiously dissent from *Our Way*."[158] On this view, dissent could be tolerated if based on conscience. It would not "be well for

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[154] See supra note 113. R

[155] See generally Bloudy Tenent of Persecution, supra note 98; Bloody Tenant Yet More Bloody, supra note 98. R R

[156] Urian Oakes, New-England Pleaded with, and Pressed To Consider the Things Which Concern Her Peace at Least in This Her Day 54 (Cambridge, Samuel Green 1673). Oakes also expressed the view that "[t]he prosperity of Church and Commonwealth are twisted together." Id. at 49.

[157] Charter of Mass. Bay of 1691, reprinted in 5 Sources and Documents, supra note 27, at 75, 83 ("[F]or ever hereafter there shall be a liberty of Conscience allowed in the Worship of God to all Christians (Except Papists) Inhabiting . . . our said Province . . . ."). For a discussion of the views of Cotton Mather and an extension of the great historian of Puritan New England, Perry Miller's, view that this was "toleration grudgingly connived at," see McLoughlin, New England Dissent, supra note 148, at 91, 108-10. R R

[158] Cotton Mather, Optanda 44 (Boston, Benjamin Harris, 1692); see also Curry, supra note 7, at 84 (quoting same); McLoughlin, New England Dissent, supra note 148, at 108-10 (explaining Mather's views on importance of toleration). R

the Civil Magistrate, with a Civil Penalty, to compel men unto this or that *Way of Worship*, which they are *Conscientiously* Indisposed unto."[159] Mather argued that persecution had almost never contributed to the successful cure of "*Hereticks.*" Rather, such "*Violences* may bring the Erroneous to be *Hypocrites*; but they will never bring them to be *Believers*."[160] Mather also acknowledged that the church in New England had been criticized in the past for insufficiently respecting liberty of conscience.[161]

Nonetheless, some actions could not be reconciled with any possible view of conscience, and these were therefore not within the logical scope of the liberty of conscience. Thus, "[t]o live without any Worship of God, or to Blaspheme and Revile his Blessed Name, is to be chastised, as abominably Criminal; for there can be no pretence *of Conscience* thereunto."[162] In the context of the late seventeenth century, this argument was not a form of extremism; it ran parallel to Locke's assertion that "those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration."[163] Denial of God evidently was not compatible with the idea of a conscience liberated by Christ's sacrifice. As late as 1755, it was still unremarkable for a Connecticut Congregationalist addressing the General Assembly to argue on the same logic that it would be "absurd, to speak of allowing Atheists Liberty of Conscience. Because he who professeth himself to be an Atheist, at the same Time professes that he has no Conscience. For what Conscience can a Man have; who believes there is no God, no moral Obligations, no future Rewards, and Punishments?"[164] Indeed, the notion of liberty of conscience for atheists does not seem to appear in the eighteenth-century materials at all.[165]

By the mid-eighteenth century, mainstream New England clergy had shifted ground to a more rationalist set of views and were increas-

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159 Mather, supra note 158, at 42-43. R

160 Id. at 44.

161 Id. at 45 ("[T]he Churches of God abroad, counted that things did not *go well* among us, until they judged us more fully come up unto the Apolitical Rule, *To Leave the otherwise-minded unto God*.").

162 Id. at 46.

163 A Letter Concerning Toleration, supra note 119, at 47. R

164 Moses Dickinson, A Sermon Preached Before the General Assembly of the Colony of Connecticut 35 (Hartford, Timothy Green 1755). The first sentence is quoted in Curry, supra note 7, at 79. But Curry, who omits the latter two sentences, consequently takes this R phrase about atheists out of context and assumes that it refers to a consensus about the limited extent of liberty of conscience. In fact, the argument repeats the traditional view as to the logical absurdity of applying the inherently religious notion of conscience to a nonbeliever.

165 Kurland, supra note 7, at 856. R

ingly likely to be Lockean rationalists.[166] By contrast, the Great Awakening had created a new, comparatively peripheral class of evangelically inclined ministers in New England and beyond.[167] Mainstream liberals and evangelical New Lights disagreed about many things, but not about the basic Lockean argument in favor of the liberty of conscience. Whenever anyone had to articulate the argument in favor of liberty of conscience, the elements of the theory that Locke refined were sure to be presented. In Boston in 1744, for example, Elisha Williams, a dissenter who sought to defend toleration for the teachings and practices of other dissenters, did so in expressly Lockean terms. Williams's pamphlet drew extensively upon both *A Letter Concerning Toleration* and the *Two Treatises of Government*.[168] Locke's views, Williams claimed, were a matter of consensus: "[W]hat the celebrated Mr. Lock[e] in his *Treatise of Government* has largely demonstrated . . . is justly to be presumed all are agreed who understand the natural right of mankind."[169]

In the mainstream, Moses Dickinson's 1755 Connecticut election sermon stated in Lockean terms that "[i]t is now generally acknowledged by Protestants, of every Denomination, that all Persecution merely upon the Account of Religion, is an unmerciful Violation, of the Law of Nature, and of the *Law of Christ*."[170] At the same time as Locke's views were becoming widely accepted,[171] it became somewhat rarer to explicate the idea of liberty of conscience specifically in Christian terms.[172] Under Locke's influence, people began to say that lib-

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166 See Alan Heimert, Religion and the American Mind: From the Great Awakening to the Revolution 16 (1966) (observing that clergy expounded Lockean concepts and "articulated a nearly pure and simple Lockeanism").

167 Such evangelicals covered a range. So-called New Lights often remained within the Congregational Church, but, following (and often exceeding) Jonathan Edwards, they tended to value and encourage an affective conversion experience. "Separates" were those New Lights who actually left the Congregational Church to set out on their own. Out of the Separates came some Baptists who insisted on adult baptism as a sign of salvation. For a general overview, see id. at 1-24.

168 See Elisha Williams, The Essential Rights and Liberties of Protestants (Boston, 1744), reprinted in Political Sermons of the American Founding Era: 1730-1805, at 51, 56-61 (Ellis Sandoz ed., 1991) [hereinafter Political Sermons].

169 Id. at 59; see also Heimert, supra note 166, at 17 (quoting same). R

170 Dickinson, supra note 164, at 24. Dickinson was in some ways a reluctant Lockean. R
Although he acknowledged that the purpose of civil government was the earthly good of society, he insisted that civil government must nevertheless take an interest in religion in order to achieve its temporal goals. Id. at 5, 15, 18.

171 The acceptance was not absolute, of course. In Old Light Yale College, the faculty forbade undergraduates who supported the Awakening from printing or circulating Locke's *A Letter Concerning Toleration*. Heimert, supra note 166, at 17. R

172 One exception is a 1783 pamphlet of Backus's. Isaac Backus, A Door Opened for Christian Liberty (Boston, 1783), reprinted in McLoughlin, Backus on Church, State, and Calvinism, supra note 145, at 427, 431-38. The phrase "Christian liberty" appears only R

erty of conscience was an "'unalienable right of every rational creature.'"[173] This characterization of liberty of conscience as an inalienable right, connected to the exercise of reason, was identifiably Lockean. Locke himself had argued that no person could alienate his liberty of conscience. In fact, Locke called liberty of conscience "every man's natural right,"[174] even though the right to liberty of conscience arose not in the state of nature but from Christ's sacrifice.

A very clear late-eighteenth-century articulation of the Lockean argument for the inalienability of conscience outside New England appeared in an item by "Brutus," an anonymous Federalist New Yorker, in the heat of the ratification debates.[175] Brutus explained the rise of the commonwealth from the state of nature in terms of common consent. Some natural liberty must be alienated to secure the ends of civil government. However, "it is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience [and] the right of enjoying and defending life . . . ."[176] Locke had put the argument a little differently. He had not expressly classed conscience with life, liberty, and property as inalienable. But he had argued that one could not alienate one's conscience to the commonwealth,[177] and so Brutus's argument was certainly faithful to the structure of Locke's argument in *A Letter Concerning Toleration*. In Brutus's milieu, the Lockean account of rights was universally accepted, and liberty of conscience was understood as an inalienable right in the Lockean pantheon.

By the late eighteenth century, some version of Locke's basic view of the nature of the liberty of conscience had been formally embraced by nearly every politically active American writing on the subject of religion and the state.[178] As the rest of this Part will show,

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once in the pamphlet and does not appear elsewhere in Backus's pamphlets. Id. at 436; see also Jonathan Parsons, Freedom from Civil and Ecclesiastical Slavery 10 (Newbury-Port, I. Thomas & H.W. Tinges 1774) ("Christian liberty, both civil and ecclesiastical, is the greatest blessing of the kind, that we can enjoy . . . .").

173 Bailyn, supra note 11, at 249 (citation omitted). R

174 A Letter Concerning Toleration, supra note 119, at 47. R

175 Brutus, Essay, N.Y. J., Nov. 1, 1787, at 1, reprinted in 13 The Documentary History of the Ratification of the Constitution 523 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter Documentary History]. For a discussion of Brutus's identity, see 13 Documentary History, supra, at 411-12.

176 Id. at 525.

177 A Letter Concerning Toleration, supra note 119, at 18. R

178 See Curry, supra note 7, at 78 (describing "broad-based agreement" on liberty of conscience among eighteenth-century colonial writers); Witte, supra note 13, at 389 ("Liberty of conscience was the general solvent used in the early American experiment in religious liberty. It was universally embraced in the young republic—even by the most churlish R R

some disagreement existed about the application of liberty of conscience and to whom it extended, but the idea itself was ubiquitous and beyond serious question. Congregationalists, evangelicals, Anglicans, and enlightened Deists alike asserted a belief in the liberty of conscience.[179] Although the terminology used by Americans was not always precise, the idea of liberty of conscience formed the intellectual and theoretical underpinning of all discussions of free exercise and establishment in the colonies and then the states.

B. State Establishments and the Language of Liberty of Conscience

The colonial establishments and the process of formal disestablishment in the years surrounding the Revolution have received a great deal of scholarly attention and need no detailed discussion here.[180] In brief, from the late seventeenth century, the New England Congregationalist institutional design, which prevailed in Massachusetts, Connecticut, and New Hampshire, provided for local churches to be organized and their ministers to be supported by local taxes.[181] Dissenters had the formal right to designate a minister of their own denomination to receive their funds, although this right was not al-

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of establishmentarians."); see also Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915, 934-36 (1992) (

> [E]ven many members of establishments held that individuals possessed an inalienable right to the free exercise of religion according to conscience. Establishment writers also frequently wrote that religion or the exercise of religion was based on an authority higher than the civil government and, increasingly, even that civil government could only act with respect to civil interests. These were common assumptions among a broad range of Americans, including supporters of establishments with rather limited notions of religious liberty.

(footnotes omitted)).

[179] Compare the assessment of Joseph Story:

> Probably at the time of the adoption of the Constitution, and of [the First Amendment], the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

2 Joseph Story, Commentaries on the Constitution of the United States 726 (1873) (footnote omitted).

Story did not say what "encouragement" meant, and he may or may not have had in mind financial support; but he pointed out correctly that whatever encouragement was desired would have had to be "not incompatible with the private rights of conscience." Id. The use of the passage by nonpreferentialists is inaccurate to the extent that they neglect to ask whether the nonpreferential support they favor would have violated liberty of conscience.

[180] See, e.g., Levy, supra note 7, at 1-78 (discussing colonial and state establishments). R

[181] Id. at 28-30. For a fuller discussion, see generally McLoughlin, New England Dissent, supra note 148. R

ways respected in practice.[182] Despite the opposition of New Light Separates and later of Baptists, this arrangement persisted into the nineteenth century.[183] Whether the New England arrangement was an "establishment" was a matter sometimes in dispute; the meaning of the word establishment was not precisely fixed.[184] Similarly, dissenters claimed the arrangement in practice violated liberty of conscience, while supporters maintained that it did not.

From the late seventeenth century until the time of the Revolution, the southern colonies all operated with an established Anglican Church and limited toleration for Protestant dissenters.[185] This was the model with which Virginia began, which Maryland adopted after the failure of its experiment with toleration of all Christians, including Catholics,[186] and which the other southern colonies adopted soon after they were founded.[187] Liberty of conscience was not denied formally, but dissenters and their churches were subject to various legal disabilities.[188] In the years surrounding the Revolution, the preferential establishment of the Anglican Church generally gave way to nonpreferential support for Christian religion.[189] Liberty of conscience was now formally stated to be a protected right.

The situation in New York and New Jersey was still different. There was greater religious heterogeneity and a formal Anglican establishment in at least some counties until the Revolution, but again, liberty of conscience for Protestants was the accepted ideal.[190] Pennsylvania never had an establishment; Penn's original charter granted liberty of conscience to all who believed in God and promised them

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[182] Levy, supra note 7, at 30-32. R

[183] See generally McLoughlin, New England Dissent, supra note 148. R

[184] According to Curry, the word generally suggested one government-preferred and -supported religion, but it could also be used more broadly, to cover arrangements like the nonpreferential system proposed in Virginia or the New England arrangement. See Curry, supra note 7, at 197-98; see also Levy, supra note 7, at 29 ("[M]ost [Congregationalist] supporters of [Massachusetts] Article III probably did not understand it to create an establishment of religion . . . ."). R

[185] Levy, supra note 7, at 4-5. R

[186] For Maryland's Act Concerning Religion of 1649, see 4 Sources and Documents, supra note 27, at 368. R

[187] Levy, supra note 7, at 5. R

[188] Id. at 5-6.

[189] See McConnell, supra note 13, at 1425-27 (tracing states' gradual embrace of "free exercise" and "liberty of conscience" for Christians). For an example of a revolutionary constitution that granted liberty of conscience while authorizing a general tax to support "Christian religion," see Md. Const. of 1776, art. XXXIII, reprinted in 4 Sources and Documents, supra note 27, at 372, 374. R

[190] See Levy, supra note 7, at 10-14 (discussing local establishments of Protestant churches with either multiple specifications or no specification of denomination); McConnell, supra note 13, at 1424 ("Protestants remained free to live and worship . . . as they chose . . . ."). R

freedom from compulsion to "frequent or maintain any religious worship, place or ministry whatever."[191] Rhode Island, too, eschewed establishment and had granted general liberty of conscience since its charter of 1663.[192]

In the various state constitutions adopted in the late-eighteenth and early-nineteenth centuries, the terms "free exercise" and "liberty of conscience" sometimes were used interchangeably. Some state constitutions adopted language that spoke of liberty of conscience and free exercise,[193] some spoke only of liberty of conscience,[194] and one guaranteed "religious liberty" and disestablished the Anglican Church without explicitly using the words "liberty of conscience."[195] Underlying all the debates was a theoretical commitment to a position of "liberty of conscience."

It is important to emphasize that the idea of liberty of conscience underlay arguments on all the issues surrounding the relationship between state and religion in early America. The contemporary American constitutional lawyer naturally may incline to think that while the idea of liberty of conscience may have informed debates about free exercise of religion, it was not directly relevant to the establishment of religion. This anachronistic impulse results from reading the federal Constitution backwards into the preconstitutional past. In fact, there was much discussion of state establishment through the lens of liberty of conscience and precious little discussion of establishment in other terms.

How did liberty of conscience function in arguments about the state establishments? Modes of establishments in the colonies differed very widely, and the word "establishment" was not used consistently. "Establishment" was archetypally thought to denote preferential support for one religious denomination, like the Church of England, but it was also used by some to include nonpreferential support for various denominations. The invocation of liberty of con-

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191 See Charter of Liberty of 1683, art. XXXV, reprinted in 8 Sources and Documents, supra note 27, at 255, 261. R

192 Charter of R.I. and Providence Plantations of 1663, reprinted in 8 Sources and Documents, supra note 27, at 362, 362-63. R

193 See, e.g., N.Y. Const. of 1777, art. XXXVIII, reprinted in 7 Sources and Documents, supra note 27, at 168, 178 (guaranteeing "free exercise" and calling same "liberty of conscience"). R

194 See, e.g., Mass. Const. of 1780, art. II, reprinted in 5 Sources and Documents, supra note 27, at 92, 93 (speaking of "conscience" but not "free exercise"); N.J. Const. of 1776, art. XVIII, reprinted in 6 Sources and Documents, supra note 27, at 449, 452 (same); N.C. Const. of 1776, art. XIX, reprinted in 7 Sources and Documents, supra note 27, at 402, 403 (same). R R R

195 See Md. Const. of 1776, art. XXXIII, reprinted in 4 Sources and Documents, supra note 27, at 372, 374. R

science in the context of establishment battles can be seen in two different contexts, prerevolutionary Massachusetts and postrevolutionary Virginia.

In the late 1760s and early 1770s, Baptists led by Isaac Backus began to protest vociferously the Massachusetts arrangement, which assessed a tax for the payment of ministers.[196] Baptists had to "secure credentials satisfactory to the majority church before they were permitted to withdraw from its support."[197] This meant obtaining a certificate stating they were, in fact, Baptists. Once they produced such a certificate, Baptists were exempt in principle from paying the ministerial taxes. But neither the certificate nor the exemption was always easily obtained. As a result, the Baptists argued, they were frequently compelled to support Congregationalist worship from which they dissented. This compelled support, they argued, violated their liberty of conscience.

The Baptists' protest was only partially successful. The Massachusetts Constitution of 1780 provided that "no subordination of any one sect or denomination to another shall ever be established by law."[198] In practice, dissenters still had to obtain certificates to avoid paying taxes. A local court ruled in a 1782 case that requiring dissenters to obtain certificates constituted unlawful subordination and accordingly held that dissenters could not be required to obtain them in order to avoid taxes.[199] But two years later, in 1784, the Massachusetts Supreme Judicial Court reversed in a different case, rendering certificates once again necessary for dissenters.[200] As a rule, a modified arrangement requiring support of one's own church remained in place[201] and persisted into the 1830s.[202] But the principled objection

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196 Their protests, those of New Light Separates, and the responses of the Congregationalist majority are explored in detail in McLoughlin, New England Dissent, supra note 148. R

197 Gerard V. Bradley, Church-State Relationships in America 25 (1987).

198 Mass. Const. of 1780, art. III, reprinted in 5 Sources and Documents, supra note 27, at 92, 94. R

199 Bolkcom v. Wilkerson (1782), cited in William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830, at 105, 229 n.203 (1994).

200 That case was Cutter v. Frost (1784), cited and discussed in Nelson, supra note 199, at 106, 229 n.205. The court also required that the certificates be given by an incorporated religious society. Since many Baptist churches were not incorporated, this meant that, in practice, some Baptist dissenters were compelled to pay taxes. Id. at 106. However, from 1786, dissenters could levy taxes for their own churches even if those churches were not incorporated. Id. at 107-08. R

201 Id. at 108.

202 The early years of the nineteenth century saw a growth in religious diversity in the New England states that led to the end of even nonpreferential funding of religion. See Charles B. Kinney, Jr., Church and State: The Struggle for Separation in New Hampshire 1630-1900, at 86 (1955) (explaining that emergence of each new denomination led one step

that funding of religion through compulsory taxes violated liberty of conscience was loudly made and widely heard.

In postrevolutionary Virginia, with the support of dissenting Baptists, Jefferson initiated, and Madison eventually took up, efforts to oppose assessments for religious purposes in Virginia. By the time of Madison's *Memorial and Remonstrance* of 1784,[203] the proposed Assessment Bill to support religious education in Virginia had been modified so that the taxpayer could specify the church that would receive his taxes or could allow the tax to be used for the encouragement of local "seminaries of learning."[204] This was a self-consciously nonpreferential model of state support for religion and understood as such. It had been designed to avoid any charges of coercion of dissenters to pay taxes to support religious teachings with which they disagreed.

Madison's objections to the Assessment Bill relied heavily on arguments derived from the Lockean conception of liberty of conscience. Madison began by explaining that religion "must be left to the conviction and conscience of every man" and that the jurisdiction of civil society therefore does not extend to matters of religion.[205] He went on to argue that the extension of civil government beyond its proper sphere threatened all liberties.[206] Madison then returned to the liberty of conscience to argue that the bill violated equality in matters of conscience "by subjecting some to peculiar burdens" while "granting to others peculiar exemptions."[207] This argument turned on

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closer toward disestablishment); Miller, supra note 7, at 267 ("The new nation, by the time of Madison's death in 1836, came to have a bewildering assortment of religious groups . . . . That assortment of newness would slice, crowd, dissipate, and eventually, after many, many decades, disestablish the de facto or voluntary Protestant establishment . . . ."); Kelly Olds, Privatizing the Church: Disestablishment in Connecticut and Massachusetts, 102 J. Pol. Econ. 277, 282 (1994) (discussing privatization of churches). **R**

[203] Madison, supra note 26. **R**

[204] A Bill Establishing a Provision for Teachers of the Christian Religion (1784). The text of this Assessment Bill is reprinted as a Supplemental Appendix to Justice Rutledge's dissent in Everson v. Bd. of Educ., 330 U.S. 1, 72-74 (1947) (Rutledge, J., dissenting).

[205] Madison, supra note 26, ¶ 1, at 299. **R**

[206] Id. ¶¶ 2-3, at 299-300. **R**

[207] Id. ¶ 4, at 300. In one intriguing passage, Madison argued that the Bill would discourage the immigration of religious dissenters:

> Instead of holding forth an Asylum to the persecuted, [the Bill] is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.

Id. ¶ 9, at 302.

Madison unfortunately did not elaborate on the relationship between compelled taxes and the degradation of dissenters "from the equal rank of citizens." He probably meant that the Assessment Bill violated the guarantee of "equal title to the free exercise of Religion according to the dictates of conscience" found in Section 16 of the Virginia Declaration

the Lockean view, expressed in the Virginia Declaration of Rights,[208] that all men were entitled equally to liberty of conscience. In the *Memorial*, Madison emphasized the idea of equality present in the Declaration of Rights, but he also made it clear that the equal right derived from the fact that liberty of conscience was a natural right: To violate this liberty was "an offence against God, not against man."[209]

Madison made other, non-Lockean arguments as well. He argued that Christianity stood in no need of assistance[210] and that aid to religion tended to undermine religion itself.[211] He suggested pragmatically that the law would be difficult to enforce and so would undermine the rule of law generally.[212] But, in his concluding paragraph, he insisted again on the status of liberty of conscience as a natural right beyond the purview of the legislature.[213] Liberty of conscience was the dominant theoretical framework for Madison's argument against establishment.

C. The Fallacy of the Distinctive Conceptions

With the history of the idea of liberty of conscience in view, it becomes clear that Puritans, evangelicals, deists, and even "civic republicans" on the eve of the Constitution shared a basic theory of religious liberty and drew on the same sources and Lockean ideas to express their views. The now-commonplace academic view, which emphasizes the differences among various views of religious liberty, obscures this fact. Late eighteenth-century writers from disparate perspectives sometimes differed in their rhetoric, but in substance, the only important difference among them was the practical question whether systems that provided nonpreferential aid to religion had the effect of violating liberty of conscience. This is not to deny theological differences among the various proponents of the view that nonpreferential systems violated conscience. Thomas Jefferson was no Calvinist. The point, rather, is that differences of religious attitude cannot be shown to be associated with substantively different arguments for lib-

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of Rights of 1776, reprinted in 10 Sources and Documents, supra note 27, at 48, 50. That is, by compelling dissenters to act against conscience, the Bill violated the formal guarantee of equality to them. To the extent that Madison had in mind this guarantee, this argument, too, can be seen as Lockean. R

208 Virginia Declaration of Rights of 1776, reprinted in 10 Sources and Documents, supra note 27, at 48. R

209 Madison, supra note 26, ¶ 4, at 300. R

210 Id. ¶ 6, at 301.

211 See id. ("[Support] is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence . . . .").

212 Id. ¶ 13, at 303.

213 Id. ¶ 15, at 304.

erty of conscience. Both Baptists and Enlightenment thinkers made Lockean arguments. Their opponents agreed that liberty of conscience was a natural right, but they thought that state support of religion was compatible with it, so long as there existed exemptions for dissenters. This Section considers each of the different groups and the views attributed to them.

1. Puritans

New England Congregationalists in the late eighteenth century were still attached to their own characteristic form of taxation to support religion.[214] But for nearly a hundred years since 1691, limited toleration had been the law in New England.[215] From June 1728, Baptists and Quakers were officially entitled to an exemption on the basis of "scruple of conscience" from religious taxation upon production of a certificate specifying their religious affiliation.[216]

This system of exemption was not always administered in a way that seemed fair to dissenters; in particular, the laws made no provision for exemptions for Congregationalists who became Separates by leaving the main Congregationalist church and, as a result, experienced what they took to be violations of conscience in the years after the Great Awakening.[217] But after many Separates changed their theological views so that they came under the exception for Baptists, their objections became less noticeable. As a result, by the late eighteenth century, most New Englanders thought of their system as a tolerant one. In the minds of most New England Congregationalists, the New England Way as it existed in the late eighteenth century simply required everyone to support his own religious group. Dissenters, or at least those who counted, received exemptions from taxation to support the majority religion, and their taxes went to support ministers of their own denomination.[218]

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[214] See McLoughlin, New England Dissent, supra note 148, at 660-84. R

[215] See Charter of Massachusetts Bay of 1691, reprinted in 5 Sources and Documents, supra note 27, at 75, 83 (granting toleration to limited Christian groups). R

[216] II Mass. Prov. AR, 494-95, cited and quoted in McLoughlin, New England Dissent, supra note 148, at 225-26 & 225 n.1. Anglicans received a comparable exemption six months earlier, in December 1727. Id. at 459-60, cited and quoted in McLoughlin, New England Dissent, supra note 148, at 221-22 & 221 n.16. R R

[217] See McLoughlin Introduction, supra note 148, at 7-10 (explaining Backus's determination to abrogate such unfair system of religious taxation). R

[218] In late-eighteenth-century New England, it was not doubted that Roman Catholics, Muslims (a theoretical rather than a practical category), and Jews possessed, in principle, an inalienable right to worship as they chose, McLoughlin, New England Dissent, supra note 148, at 610; Article II of the Massachusetts Constitution of 1780 conferred a right to liberty of conscience on "all men." Mass. Const. of 1780, art. II, reprinted in 5 Sources and Documents, supra note 27, at 92, 93. Yet it was also not certain that these dissenters were R R

The New England majority was thus taken aback when, in the 1770s, Isaac Backus and other Baptists began to depict the New England Way as intolerant.[219] In a pointed diary notation noticed by Bernard Bailyn, John Adams described their system as "'the most mild and equitable Establishment of religion that was known in the World, if indeed . . . [it] could be called an Establishment.'"[220] The New Englanders' dismay indicates that they viewed their religious system as respecting, not infringing, liberty of conscience. The "Puritan" conception of liberty of conscience by the late eighteenth century was, in fact, no longer very different from the basic Lockean idea of liberty of conscience. This Lockean idea was, in New England, thought to be compatible with a system of taxation for public ministers, subject to exemptions for dissenters to support their own ministers.[221]

2. Baptists

As for late-eighteenth-century Baptists, their distinctiveness consisted in the undoubtedly important fact that they embarked on a vocal campaign to avoid taxation in religious matters. In arguing against such taxation, they drew upon a set of arguments for liberty of conscience that had been made famous by Locke.[222] Perhaps in part because the eighteenth-century Baptists, unlike Madison and Jefferson, invoked biblical prooftexts in support of their Lockean views, scholars often have failed to acknowledge the standard and unremarkable na-

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exempt from paying for the support of Protestant ministers. Article III of the Constitution of 1780 provided that "all moneys paid by the subject to the support of public worship and of the public teachers . . . shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination," but it went on to say that "every denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law." Id. at 93-94. This certainly did not include Muslims or Jews, and it likely did not include Catholics, because the "public" teachers were the "public Protestant teachers of piety" mentioned earlier in Article III. Id. at 93.

[219] See Bailyn, supra note 11, at 263-64 (describing shock of established church of Massachusetts when Backus criticized it as intolerant). R

[220] Id. at 248 (quoting 3 Diary and Autobiography of John Adams 312 (L.H. Butterfield et al. eds., Harvard Univ. Press 1961) (1782-1804)).

[221] Accounts that wish to make the Puritan conception somehow intellectually distinctive are anachronistically looking at the first half of the seventeenth century. See, e.g., Witte, supra note 13, at 380 (discussing limited liberty of conscience for dissenters in eighteenth-century New England). R

[222] Even McLoughlin, who argues for the distinctiveness of the Baptist vision, acknowledges that while Backus denied Locke's theory of the social contract, he embraced and used the arguments from *A Letter Concerning Toleration*. McLoughlin Introduction, supra note 148, at 42-44. Although McLoughlin says that "Backus appl[ied] the rationalistic arguments of Locke's *Letter Concerning Toleration* to suit his own pietistic purposes," id. at 44, he never shows how these purposes were distinctively pietistic except to say that Backus was himself a pietist. R

ture of these well-worn arguments. John Witte, Jr.'s treatment of the Baptist position quotes John Leland, "the fiery Baptist preacher,"[223] as saying "bluntly" that "'[t]he notion of a Christian commonwealth should be exploded forever.'"[224] Witte implies that this view was distinctively evangelical. Yet in making this statement, the Baptist itinerant Leland was doing no more than echoing Locke's statement that "there is absolutely no such thing, under the Gospel, as a Christian commonwealth."[225] The statement is thus not particularly unique to an evangelical perspective on liberty of conscience.

In fact, John Leland's argument for liberty of conscience followed straightforwardly Lockean lines, as expressed in a series of pamphlets, one tellingly entitled *The Rights of Conscience Inalienable*.[226] First, conscience was an inalienable right: "'Does a man upon entering into social compact surrender his conscience to that society to be controlled by the laws thereof . . . ?' I judge not . . . ."[227] Second, religious conscience was irreducibly individual: "Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience."[228] Third, government lacked a legitimate role in governing religious affairs: "If government can answer for individuals at the day of judgment, let men be control[l]ed by it in religious matters; otherwise let men be free."[229] Put bluntly, "religious opinions of men [are not] the objects of civil government nor any ways under its control."[230] Leland followed this argument with a lengthy excursus that relied heavily on Jefferson's writings on religious liberty. He even repeated the Jeffersonian tagline that "[g]overnment has no more to do with the religious opinions of men than it has with the principles of the mathematics."[231]

In attributing a distinctive view of religious liberty to the Baptists, Witte also quotes Isaac Backus to the effect that "'nothing can be true

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223 Witte, supra note 13, at 381. R

224 Id. at 382 (citation omitted).

225 A Letter Concerning Toleration, supra note 119, at 40. Madison echoed this argument in his postpolitical life. See James Madison, Detached Memoranda, reprinted in James Madison on Religious Liberty 89, 93 (Robert S. Alley ed., 1985) [hereinafter Madison on Religious Liberty] (arguing against religious intervention by government). R

226 John Leland, The Rights of Conscience Inalienable (1791), reprinted in Political Sermons, supra note 168, at 1079. R

227 Id. at 1085.

228 Id.

229 Id.

230 Id. at 1086.

231 Id. at 1089. For a discussion of the pamphlet, see L.H. Butterfield, Elder John Leland, Jeffersonian Itinerant, 62 Proc. Am. Antiquarian Soc'y 155, 197-99 (1952).

religion but a voluntary obedience unto [God's] revealed will[ ]'."[232] Yet insistence on the voluntary character of true religion can be found in Locke.[233] Finally, Witte quotes the "evangelical preacher"[234] Israel Evans[235] as saying in a 1791 election sermon that "the all-wise Creator invested [no] order of men with the right of judging for their fellow-creatures in the great concerns of religion."[236] Once again, the sentiment could come straight from Locke or even Perkins, both of whom held that God had never assigned any earthly leader authority over the souls of others.[237]

William McLoughlin, who spent years studying the New England Baptists, thought that juxtaposing Backus's proposed liberty-of-conscience provision for the Massachusetts Bill of Rights to George Mason's analogous proposal for the Virginia Bill of Rights showed the great difference between pietism and rationalism on the topic of liberty of conscience. Indeed, McLoughlin thought the comparison sufficiently revealing to include in two different books.[238] Although he thought the two passages conflicted sharply,[239] a close look at the two passages in fact shows that the two formulations were in their logical content all but identical. The juxtaposition thus suggests the opposite of what McLoughlin maintained.

The passages are as follows, with Backus's first:

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[232] Witte, supra note 13, at 382 (quoting Isaac Backus, Draft for a Bill of Rights for the Massachusetts Constitution (1779), reprinted in McLoughlin, Backus on Church, State, and Calvinism, supra note 145, at 487 app.3). R R

[233] See A Letter Concerning Toleration, supra note 119, at 33 ("Whatsoever is not done with that assurance of faith, is neither well in itself, nor can it be acceptable to God. To impose such things, therefore, upon any people, contrary to their own judgment, is, in effect, to command them to offend God . . . ."). Both Backus and Locke emphasize the necessity of voluntary obedience. And although Backus speaks of God's "revealed will," see infra text accompanying note 240, there is no reason to think that Locke could not also rely on scripture as a guide to ascertaining God's will. R R

[234] Witte, supra note 13, at 382. R

[235] Evans, who served as a chaplain to the Army during the Revolution, also addressed the assembled company at Yorktown in what was "probably the largest audience gathered in America between the triumphs of Whitefield [during the Great Awakening] and Webster's first address at Bunker Hill [in 1825]." Heimert, supra note 166, at 498. R

[236] Witte, supra note 13, at 382 (quoting Israel Evans, A Sermon Delivered at Concord, Before the Hon. General Court of the State of New Hampshire at the Annual Election (1791), reprinted in Political Sermons, supra note 168, at 1059, 1062-63). R R

[237] See Perkins, supra note 75, at 30 ("God alone makes lawes binding conscience properly, and no[ ] creature can doe the like."); A Letter Concerning Toleration, supra note 119, at 18 ("[I]t appears not that God has ever given any such authority to one man over another, as to compel any one to his religion.") R R

[238] McLoughlin, New England Dissent, supra note 148, at 600-01; McLoughlin Introduction, supra note 148, at 47-48. R R

[239] McLoughlin Introduction, supra note 148, at 47. R

> "As God is the only worthy object of all religious worship, and nothing can be true religion but a voluntary obedience unto his revealed will, of which each rational soul has an equal right to judge for itself; every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby."[240]

Now Mason's proposal:

> "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other."[241]

McLoughlin admits that "both articles agree in principle with Locke that reason and conscience cannot be forced."[242] This crucial commonality demonstrates the degree of agreement between the two passages on the question of liberty of conscience. Both passages share the premise that the only worthwhile belief is that arrived at voluntarily through a process of reasoning and both derive from this premise the conclusion that the state must respect liberty of conscience.

McLoughlin tries mightily to differentiate the two passages. He claims, first of all, that Mason's use of the words "Creator" and the "duty" towards that Creator reflected an enlightened perspective, in contrast to Backus's reference to "God" as the "worthy object of all religious worship."[243] But as the example of Israel Evans, just quoted, demonstrates, evangelicals, too could use the word "Creator."[244] Mason's description of religion as "the duty which we owe to our Creator" also does not differ significantly from Backus's statement that "God is the only worthy object of all religious worship." It is true that Mason does not use the word "worship," but the import of both statements is that humans are obligated to render to God some unspecified set of duties known as "religion."

McLoughlin also argues that "Mason wanted separation of church and state so that each man could follow his reason and conviction wherever it might lead him,"[245] whereas "Backus wanted it so that each man could find his way to 'true religion' expressed in the

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[240] McLoughlin, New England Dissent, supra note 148, at 600-01. **R**

[241] Id. at 601.

[242] Id. at 600-01.

[243] Id.

[244] See supra note 236 and accompanying text. Evans referred to God as the Creator **R**
repeatedly in his sermon. See Evans, supra note 236, at 1063-69, 1071. **R**

[245] McLoughlin, New England Dissent, supra note 148, at 601. **R**

'revealed will' of God."[246] But Backus, like Mason, invoked the logic of reason. Indeed, Backus asserted with respect to "true religion" and God's "revealed will" that "each rational soul has an equal right to judge for itself." Thus, even if Backus cared about biblical text more than did Mason, the two were equally ready to rely on the individual's use of what Backus called "the full persuasion of his own mind." Finally, McLoughlin claims that Mason "implied that reason alone was sufficient"[247] for becoming aware of one's duties to God, "while Backus held that the grace of God was a *sine qua non*."[248] This may indeed have been Backus's view, but it was nowhere reflected in his proposed article for the Massachusetts Bill of Rights, which implied no less than Mason's article that the "rational soul" ought to judge in matters of religion. That so astute a student of the era as McLoughlin could insist on differences even when confronted with two nearly identical provisions suggests how powerful is the impulse to discover distinctive theories of religious liberty.

In his treatment of the subject, Michael McConnell argues that evangelicals "employed essentially religious arguments based on the primacy of duties to God over duties to the state in support of disestablishment and free exercise."[249] This is accurate enough, but it does not particularly distinguish the Baptists from other supporters of religious liberty. The primacy of duty to God over duty to the state was a fundamental piece of the argument for liberty of conscience, already explicit in Calvin, and recurring not only in Perkins, but in Locke as well. Indeed, such a proposition about the primacy of duties to God formed the cornerstone of the first paragraph of Madison's Lockean *Memorial and Remonstrance*. Madison wrote: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[250]

Madison's argument is, in fact, identical to the Baptist position as characterized by McConnell. This is not surprising, because Madison's argument, like that of the Baptists, is thoroughly Lockean. The Baptists could and did draw on Locke as easily as did Madison, and in any case, as we have seen, Locke's argument itself relies on religious premises.

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246 Id.

247 Id.

248 Id.

249 McConnell, supra note 13, at 1442. R

250 Madison, supra note 26, ¶ 1, at 299. R

3. Enlightened Deists

The "enlightened" and presumably deistic strand in American thought about church and state turns out to be rather harder to identify than one might expect. It is sometimes thought that where evangelicals sought to protect religion from the state, enlightened figures sought to protect the state from the baleful influence of organized religion. Howe called this view the "principle of politics," and he associated it with Jefferson.[251] The trouble with this assertion is that one can look widely in eighteenth-century American writings and find little trace of the argument that the state (as opposed to individual religious conscience) stood in real, systematic danger from an established church. The argument is all but absent from the *Memorial and Remonstrance*.[252] The closest it comes is to claim that religious authorities sometimes have "erect[ed] a spiritual tyranny on the ruins of the Civil authority" and at other times have upheld tyranny.[253] A review of Madison's collected writings on religious liberty also indicates that this argument played only a peripheral role.[254] A private letter from Madison to Jefferson following the Constitutional Convention touches on religion only to propound Madison's new theory that the federal government would avoid religiously motivated persecution of dissenters by staying large and diverse.[255]

For his part, Jefferson may have been a private Deist who always distrusted the clergy, but his writings on religious liberty, at least those from the era before the French Revolution, do not emphasize the argument that the state must fear established religion.[256] This is not to

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[251] Howe, supra note 12, at 8. **R**

[252] Although the "principle of politics" is absent from *Memorial and Remonstrance*, Madison did make an argument loosely related to what Howe called the principle of religion, asserting that state support of religion had done nothing to help religion. Madison, supra note 26, ¶ 12, at 303. In this passage, however, Madison does not "reviv[e] a doctrine originally put forth by Roger Williams" to the effect that "separation of church and state was . . . needed to protect religion from government," as is asserted by Richard B. Bernstein, Are We to Be a Nation?: The Making of the Constitution 69 (1987). Bernstein provides no direct citation for this proposition. Id. **R** **R**

[253] Madison, supra note 26, ¶ 8, at 302. **R**

[254] See generally Madison on Religious Liberty, supra note 225. In his "Detached Memoranda," Madison did say that the accumulation of property in the hands of religious corporations in Europe was a negative development that led to the (in his view, correct) appropriation of those lands during the Reformation. See id. at 91. But this observation was a warning against allowing religious corporations to own too much land in America, see id., and it did not go to the argument that established churches corrupted government. **R**

[255] See Letter from James Madison to Thomas Jefferson (Nov. 1, 1787), excerpts of which are reprinted in 13 Documentary History, supra note 175, at 442, 449 (John P. Kaminski & Gaspare J. Saladino eds., 1981). **R**

[256] After Jefferson's time in France, he seems to a greater degree to have become worried about the influence of the church on the state. In a letter of 1801, he speaks of "'the

say that his writings on religious liberty do not reflect his strong preference for reason in matters of religion. His draft of the Virginia Bill for Establishing Religious Freedom declared that

> Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion.[257]

The Bill went on to say that, although God could have propagated religion by "coercions" on body or mind, he instead chose "to extend [religion] by its influence on reason alone."[258] These sentiments were certainly rationalist.[259] Jefferson's 1776 notes on religion also reflected Lockean arguments about the inalienability of religious conscience and the need for religion to flow from "the internal persuasion or belief of the mind."[260] But unlike some antireligious figures of the French enlightenment who feared and loathed the effect of organized religion on their state, the early Jefferson seems not to have been very concerned that established religion put the state in any particularly grave danger.[261] In fact, although his view of religious liberty may have been inflected by an enlightened insistence on the freedom of

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dominion of the clergy, who had got a smell of union between Church and State.'" Letter from Thomas Jefferson to Moses Robinson (n.d., 1801), quoted in Robert A. Ferguson, The American Enlightenment: 1750-1820, at 73. A letter to John Adams in 1817 praises the end of the state support of religion in Massachusetts; in it, Jefferson calls the New England Way "a protestant popedom." Letter from Thomas Jefferson to John Adams (n.d., 1817), quoted in Ferguson, supra, at 73.

257 Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), reprinted in 2 The Papers of Thomas Jefferson 545, 545 (Julian P. Boyd ed., Princeton Univ. Press 1950) [hereinafter Jefferson Papers] (footnotes omitted).

258 Id. The final version enacted by the State of Virginia in 1785 omitted the phrase referring to reason.

259 With reference to the "Virginia act for religious freedom," Jefferson wrote to Madison from Paris that "it is comfortable to see the standard of reason at length erected, after so many ages during which the human mind has been held in vassalage by kings, priests and nobles . . . ." Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), reprinted in 1 The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826, at 457, 458 (James Morton Smith ed., 1995) [hereinafter Republic of Letters].

260 Thomas Jefferson, Notes on Locke and Shaftesbury (1776), reprinted in 1 Jefferson Papers, supra note 257, at 544, 545. R

261 Americans in the eighteenth century were of course capable of anticlerical invective. But this anticlericalism was not normally framed in terms of avoiding the baleful effect of an established church on the state. Thus "Cassius," an anonymous federalist columnist writing in Massachusetts in October 1787, attacked an anonymous antifederalist, whom he said was a "gentleman of the cloth," as a "[p]olitical Jesuit[ ]," attempting to use clerical authority to mislead the "weak and ignorant." Cassius, Editorial, Mass. Gazette, Oct. 2, 1787, reprinted in 4 Documentary History, supra note 175, at 30, 30-32 (John P. Kaminski R

the individual will, his substantive claim that religious decisions ought to be freely made to avoid hypocrisy was perfectly consistent with, and even echoed, religiously grounded arguments for liberty of conscience.

4. Civic Republicans

Finally, the supposed strain of a distinctive "civic republican argument" in favor of government support of religion turns out to be difficult to identify in the eighteenth century. McConnell has argued that the proliberty Baptists were engaged in a struggle with civic republicans who argued for state support of religion on the ground that it was necessary for civic virtue.[262] To McConnell, this opposition represents an attractive irony: Religious evangelicals argued for freedom while secularists argued for state support of religion.[263] The existence of distinctively civic republican support for funding of religion, however, is questionable, and not only because civic republican arguments for virtue belong to an intellectual tradition that has generally looked skeptically upon religion.[264] In fact, as an example of precisely the wrong sort of relationship between church and state, Noah Webster invoked classical Rome, where, he reported, religion was used to support the authority of the legislature.[265] Happily, he noted, "in North America, by a singular concurrence of circumstances, the possibility of establishing this influence [i.e., religion], as a pillar of government, is totally precluded."[266]

Of course, there were plenty of eighteenth-century Americans who argued for continued state support of religion in the form of nonpreferential taxation. Patrick Henry and his supporters argued for the

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& Gaspare J. Saladino eds., 1997). But there was no connection between the epithet and issues of establishment of religion.

[262] McConnell, supra note 13, at 1441. **R**

[263] Id. at 1442.

[264] For civic republicans, the engines of virtue were typically education, see Gordon S. Wood, The Creation of the American Republic: 1776-1787, at 426 (1969), and good governmental arrangements designed to minimize the effects of corruption, see id. at 430-67. For the clergy, Wood points out, religion, not virtue, was the source of "salvation for a corrupted people." Id. at 427. But needless to say, the Christian view that only religion could save people from complete corruption had an existence entirely separate from the civic republican fear of the corruption of virtue. This is not to say that in a political environment in which civic republican ideas were in play, the old argument that religion inculcated good behavior might not have been understood by some as consistent with republicanism. But the spirit of republican participation in self-government differed from the received view that government support of religion encouraged obedience to the laws.

[265] Noah Webster, Debate, "A Citizen of America" (Phila., Oct. 17, 1787), reprinted in 1 The Debate on the Constitution 154-55 (Bernard Bailyn ed., 1993) [hereinafter Debate on Constitution].

[266] Id. at 155.

Assessment Bill in Virginia, and nearly everyone in New England supported the continuation of the New England Way. To their supporters, both arrangements seemed perfectly consistent with liberty of conscience.[267] To support their position, they relied on inherited arguments regarding the usefulness of religion in preserving happiness, order, and government. The thrust of these arguments was that people who obeyed God would obey the law. But these arguments had little or nothing to do with the tradition of "civic republicanism," nor did they typically invoke its distinctive language of civic virtue and self-rule.

McConnell's prooftexts reveal, not a new civic republican argument for support of religion, but a set of familiar, well-worn arguments in favor of the established church that had been employed in England at least since Richard Hooker.[268] "The most famous statement" in the civic republican vein, says McConnell, "was Washington's farewell address," in which he described religion and morality as "'indispensable supports'" for "'political prosperity.'"[269] Political prosperity is not identical to civic virtue, however, and in fact, virtue does not appear in the passage at all. Furthermore, the boilerplate in Washington's farewell address about the value of religion for prosperity did not come in the context of support for government funding of religion nor of any opposition to liberty of conscience.[270] McConnell's

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[267] Thus, the supporters of the Assessment Bill did not call for any change to the religious freedom provision in the Declaration of Rights, and Article II of the Massachusetts Constitution of 1780 guaranteed liberty of conscience even as Article III provided for taxes to support religion. See Mass. Const. of 1780, arts. II-III, reprinted in 5 Sources and Documents, supra note 27, at 92, 93. R

[268] See Richard Hooker, Of the Laws of Ecclesiastical Polity, bk.5 (1597), reprinted in 2 The Folger Library Edition of the Works of Richard Hooker 15 (W. Speed Hill ed., 1977). The first subheading in Chapter I reads: "True Religion is the roote of all true virtues and the stay of all well ordered common-wealthes." Id. at 16. A work that was known in the colonies and made the argument for support of religion was that of the Bishop of Gloucester, William Warburton, The Alliance Between Church and State, or The Necessity and Equity of an Established Religion and a Test-Law Demonstrated, from the Essence and End of Civil Society, upon the Fundamental Principles of the Law of Nature and Nations (1736). The work was quoted disapprovingly by Isaac Backus. See Isaac Backus, Policy as Well as Honesty Forbids the Use of Secular Force in Religious Affairs (Boston, Draper & Folsom, 1779), reprinted in McLoughlin, Backus on Church, State, and Calvinism, supra note 145, at 367, 375-76. R

[269] McConnell, supra note 13, at 1441 (quoting Washington, supra note 4, at 212). R

[270] Washington in fact did think that compelled support for the religion of one's choice was consistent with liberty of conscience, so long as no one was obligated to support a religion with which he disagreed. In a 1785 letter to George Mason, he said he was "not amongst the number of those who are so much alarmed" at nonpreferential assessments. Letter from George Washington to George Mason (Oct. 3, 1785), in 28 The Writings of George Washington, 1784-1786, at 285 (John C. Fitzpatrick ed., 1938). In the Farewell Address, however, he did not argue in favor of such support. See Washington, supra note 4. R

only other support for his argument that civic republicans supported establishment is a petition in favor of the Virginia Assessment Bill, which stated that "the prosperity and happiness of this country . . . depend[ed] on . . . religion" and sought mandatory contribution "to the support of religion."[271] This passage also does not invoke civic virtue but only the general prosperity and happiness that religion was conventionally said to promote.[272] Indeed, even Isaac Backus, neither a civic republican nor an advocate of state support for religion, subscribed to the same commonplace (albeit more colorfully expressed): "[R]eligion is as necessary for the well-being of human society as salt is to preserve from putrefaction . . . ."[273]

Witte, who also claims to find a civic republican strand in support of funding of religion, cites more arguments for an established church that had existed in England for centuries: "'[R]eligion and its institutions are the best aid of government' . . . 'by strengthening the ruler's hand, and making the subject faithful in his place, and obedient to the general laws.'"[274] Phrased another way, "'[i]nstitutions for the promotion of good morals, are objects of legislative provision and support: and among these . . . religious institutions are eminently useful and important.'"[275] These statements could have been uttered in support of the Anglican establishment.[276] They make the point that religion promotes obedience to the law but has no particular relationship to the distinctive discourse of civic virtue.

The Massachusetts Constitution of 1780 declared that "the happiness of a people and the good order and preservation of civil government essentially depend on piety, religion, and morality"[277] but said nothing about republican virtue; it simply stated a truism about religion's role in the preservation of government. Witte, in his discussion

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[271] See McConnell, supra note 13, at 1441 (quoting Petition for General Assessment (Nov. 4, 1784), reprinted in Charles F. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (photo. reprint 1971) (1900)). **R**

[272] Although the authorship of the petition cited by McConnell is uncertain, Madison, in a letter to Jefferson, mentions petitions in favor of the Assessment Bill "from below the blue ridge" and then notes that many Presbyterian clergy actually supported the Bill. See Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), reprinted in 1 Republic of Letters, supra note 259, at 361. Such supporters, however, were unlikely to support the petition from the perspective of civic republicanism. **R**

[273] Backus, supra note 268, at 371. **R**

[274] Witte, supra note 13, at 386-87 (quoting Nathan Strong, Election Sermon 15 (1790)). **R**

[275] Id. at 387 (quoting Oliver Ellsworth, Report of the Committee to Whom Was Referred the Petition of Simeon Brown and Others (1802), reprinted in 11 The Public Records of the State of Connecticut 371, 373 (Christopher Collier ed., 1967)).

[276] See J.C.D. Clark, English Society: 1688-1832, at 226-27 (1985) (giving arguments made for necessity of religion to support obedience to royal government).

[277] Mass. Const. of 1780, art. III, reprinted in 5 Sources and Documents, supra note 27, at 92, 93. **R**

of the Massachusetts Constitution of 1780, somewhat misleadingly quotes an 1833 amendment to the 1780 provision: "'[T]he public worship of God and instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government.'"[278] The 1833 amendment's tacked-on reference to "republican government" did not appear in the 1780 provision. There was thus nothing in the substance or language of the 1780 constitution worthy of the label "civic republican." Nor is there reason to think that the continuation of the New England Way in 1780 was grounded in civic republicanism as opposed to religious traditionalism.

A recent article by British historian Colin Kidd also argues for the presence of a civic republican strain of argument in "revolutionary America."[279] But Kidd, too, falls short of showing that there was a distinctively republican or virtue-oriented strain of argument for government support of religion in the eighteenth century. Kidd points to the Roman writer Polybius's view that Roman religion gave Rome its victory over Carthage.[280] He also notes that some eighteenth-century British writers attributed the decline of Rome to the degradation and collapse of the indigenous Roman religion.[281] But in order to find Americans echoing the view that the decline of religion corrupted the classical republics, Kidd must go forward to Mercy Otis Warren's 1804 history of the American Revolution and to an article by Fisher Ames of the same year.[282] By 1804, after the French Revolution, we are no longer in "revolutionary America" with respect to opinions about religion and the state. What is more, in 1804, New Englanders like Warren and Ames were concerned with rather different questions of internal New England church politics.[283]

Kidd further characterizes American civic republicanism as seeking to "reconcile" a "liberationist" impulse against religious oppression with a "conservative" impulse "to defend religious institutions as vital buffers against the anarchy."[284] Yet when it comes to identifying a distinctive strain of civic republicanism in America, Kidd does not

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[278] Witte, supra note 13, at 387 & n.74 (citing Mass. Const. of 1780, art. III, amended by amend. of 1833, art. XI). R

[279] See generally Kidd, supra note 16. R

[280] Id. at 1012.

[281] See id. at 1013 & nn.25-26 (citing, in particular, Edward Wortley Montagu, Jr. and Adam Ferguson).

[282] See id. at 1023 & n.54 (citing Mercy Otis Warren, 2 History of the Rise, Progress and Termination of the American Revolution 680-81 (Lester H. Cohen ed., Liberty Fund 1989) (1805) and Fisher Ames, Monitor, Palladium, Apr. 17, 1804, reprinted in 1 Works of Fisher Ames 226 (W.B. Allen ed., 1983)).

[283] That they invoked Roman religion in 1804 does not shed light on the era leading to the enactment of the Establishment Clause.

[284] Kidd, supra note 16, at 1018. R

bring to bear sources beyond those cited by McConnell and Witte, including the preamble to the Massachusetts Constitution of 1780.[285] No doubt it was often said, especially in New England, and especially in election sermons, that piety and fear of God were "'powerful restraints upon the minds of men'" and hence useful for ensuring a law-abiding citizenry.[286] But it does not appear to be the case that "[o]ne of the major Anti-Federalist criticisms levelled at the new Constitution was that the very extent and diversity of the United States threatened to undermine the supportive relationships which existed in the states between organized religion and political virtue."[287] Nor does Kidd offer any support for this particular claim. Kidd correctly notes the received view that fear of an afterlife encouraged truth-telling on oath.[288] But Locke had made the same point—indeed, it was his basis for excluding atheists from toleration—and there was nothing "republican" about it.[289]

Kidd's sources, then, confirm that in the late eighteenth century, many Americans still believed that religion was the bulwark of morality, one that would encourage citizens to follow the law and tell the truth. This was the cliché that Washington meant to invoke when, in his Farewell Address, he encouraged Americans not lightly to "indulge the supposition that morality [could] be maintained without religion."[290] To call this view "republican," however, implies that any late-eighteenth-century American thinker can be classified as "republican." There might be something to this assumption, but it does not contribute to a useful categorization for purposes of intellectual history. Following the law is something desirable in royal subjects and republican citizens alike. Law-abiding behavior is not the same thing as possessing republican virtue.

In short, the supposed strands of different theories on liberty of conscience cannot be sustained after closer inquiry. There was broad agreement in late-eighteenth-century America that liberty of conscience was the key value that ought to inform any discussion of church and state. There was also a live disagreement about whether

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285 See id. at 1024.

286 See id. at 1019 & n.41 (quoting Phillips Payson, A Sermon (1778), reprinted in 1 American Political Writing During the Founding Era: 1760-1805, at 523, 529 (Charles S. Hyneman & Donald S. Lutz eds., 1983)).

287 Id. at 1021.

288 See id. at 1021-22 (noting view that belief in "a future state of rewards and punishments" contributed to social good and that oath lost sacredness with atheists).

289 See A Letter Concerning Toleration, supra note 119, at 47 ("Those are not at all to be tolerated who deny the being of God. . . . [O]aths, which are the bonds of human society, can have no hold upon an atheist."). R

290 Washington, supra note 4, at 212. R

nonpreferential funding of religion necessarily violated liberty of conscience. It was against this backdrop that the Establishment Clause came into being.

III
The Framing of the Establishment Clause and the Liberty of Conscience

A. The Proposed Religion Amendments

In the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience. The absence of a guarantee of liberty of conscience was an argument repeatedly sounded against the draft Constitution and connected to the need for a provision that would prevent a national establishment of religion. At the Pennsylvania ratifying convention, one John Smilie explained his opposition to the draft Constitution by saying that "[t]he rights of conscience are not secured . . . . Congress may establish any religion."[291] A Pennsylvania petition of uncertain origin proposed the following amendment: "That the rights of conscience should be secured to all men, that no man should be molested for his religion, and that none should be compelled contrary to their principles and inclination to hear or support the clergy of any one religion."[292]

Writing in the *Philadelphia Independent Gazetteer*, Timothy Meanwell gave another formulation for a proposed amendment, also deriving opposition to establishment from the liberty of conscience:

> That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own conscience and understanding: And that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent . . . .[293]

The logical connection between protection of liberty of conscience and establishment was clear in all of these Pennsylvania formulations.

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[291] Proceedings and Debates of the Pennsylvania Convention, reprinted in 2 Documentary History, supra note 175, at 326, 592 (Merrill Jensen ed., 1976). R

[292] Petition Against Confirmation of the Ratification of the Constitution, Jan. 1788, reprinted in 2 Documentary History, supra note 175, at 710, 711 (Merrill Jensen ed., 1976). R

[293] Timothy Meanwell, Phila. Indep. Gazetteer, Oct. 29, 1787, reprinted in 14 Documentary History, supra note 175, at 511, 511 (John P. Kaminski & Gaspare J. Saladino eds., 1983). The text went on to guarantee no abridgment of civil rights on the basis of religion and the preservation of "the right of conscience in the free exercise of religious worship." Id. at 512. R

The direct connection between liberty of conscience and establishment was also drawn by "Z," a critic of the proposed Constitution, writing in the *Boston Independent Chronicle* during the ratification debates.[294] This writer first characterized rights of conscience as rights "which it would be equally sacrilegious for the people to *give away*, as for the government to *invade*."[295] This phrase suggests reliance on the Lockean argument regarding rights of conscience: It would be a violation of religion for government to coerce in such matters, and it would also be sinful for the individual to act against conscience. Without assurance of the rights of conscience, "what security will there be, in case the government should have in their heads a predilection for any *one* sect in religion? What will hinder the civil power from erecting a national system of religion, and committing the law to a set of lordly priests?"[296] The primary reason not to have an established religion, then, was the protection of liberty of conscience of dissenters.

Meanwhile, in Virginia, Patrick Henry reportedly was warning constituents that "a religious establisht. was in Contemplation under the new govt."[297] Henry himself had, in Virginia, ardently supported non-preferential state collection of funds for religious purposes. It follows that he was warning against a mandated, preferential establishment at the federal level. In other words, Henry was warning against coerced payment of taxes in violation of liberty of conscience. A letter from Orange County, Virginia, to James Madison, reported that local Baptists, especially preachers, were "much alarm'd fearing relegious liberty is not Sufficiently secur'd" in the proposed Constitution.[298] Enclosed with the letter was a list of concerns about the Con-

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294 "Z," Boston Indep. Chron., Dec. 6, 1787, reprinted in 14 Documentary History, supra note 175, at 358, 359 (John P. Kaminski & Gaspare J. Saladino eds., 1983). R

295 Id.

296 Id. Z concluded by invoking the specter of a priestly establishment, which he said was "the grand engine in the hand of civil tyranny," in exchange for whose compliance the tyrannical civil authority would allow the clergy to persecute heretics. Id.

297 Letter from John Blair Smith to James Madison (June 12, 1788), reprinted in 9 Documentary History, supra note 175, at 607, 608 (John P. Kaminski & Gaspare J. Saladino eds., 1990). Smith thought this concern to be an obvious lie by Henry, although his reasoning was decidedly circuitous. He pointed out to Madison that Henry "forgets that the Northern States are more decided friends to the voluntary support of Christian Ministers, than the author or at least, the warm abettor of the Assessment bill in this State [i.e. Henry himself]." Id. at 608. The logic seems to be that, since Northerners supported voluntary religious contributions at the state level more strongly than did Henry himself, they could not possibly have been intending to impose a nonvoluntary religious establishment at the federal level. Of course, in reality, not all Northerners were strict supporters of the voluntarism they had enacted into law. R

298 Letter from Joseph Spencer to James Madison (Feb. 28, 1788), reprinted in 16 Documentary History, supra note 175, at 252, 252 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter Letter from Spencer to Madison]. R

stitution attributed by the author of the letter to Baptist preacher John Leland.[299] This enclosed text made explicit the connection between liberty of conscience and the fear of establishment:

> What is dearest of all—*Religious Liberty*, is not Sufficiently Secured . . . if a Majority of Congress with the presedent favour one Systom more then another, they may oblige all others to pay to the Support of their System as Much as they please, & if Oppression dose not ensue, it will be owing to the Mildness of Administration & not to any Constitutional defense . . . .[300]

In response to such concerns about violation of liberty of conscience through establishment, an anonymous Virginia federalist dismissed the idea that Congress would "undertake to form a religious establishment."[301] To take such a step would be "to *disturb the union; to destroy justice, excite civil commotions and religious feuds, and to annihilate religious liberty* . . . ."[302] That is, establishment would be unwise as a matter of preserving national consensus and also would violate the religious liberty of dissenters.

At the Virginia ratifying convention, Madison responded directly to Patrick Henry's concern about the possibility that the federal government might compel payment of taxes for religious purposes. At this point Madison still sought to win ratification without proposed amendments. Madison therefore argued—perhaps a bit disingenuously—that even a bill of rights would do little to protect "people from paying for the support of one particular sect"[303] in violation of conscience if a single sect were to be established by law. The best protection, Madison argued, echoing the *Memorial and Remonstrance*, was the multiplicity of religious groups across the United States.[304] An amendment was therefore not necessary. Despite Madison's claim, the Virginia convention ultimately proposed just that—an amendment to bar an establishment. A slight variant on

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[299] Id. at 252-54. Leland, who was Massachusetts-born, was among the leading Virginia Baptists of his day. See supra text accompanying notes 223-31. R

[300] Letter from Spencer to Madison, supra note 298, at 254. Madison was apparently prompted by the list of concerns to visit Leland and seek his support for election as a delegate to the Virginia ratifying convention. See Butterfield, supra note 231, at 188-92. R R

[301] A Freeholder, Va. Indep. Chron., Apr. 9, 1788, reprinted in 9 Documentary History, supra note 175, at 719, 725 (John P. Kaminski & Gaspare J. Saladino eds., 1990). R

[302] Id.

[303] James Madison, Remarks at the Virginia Convention Debates (June 12, 1788), reprinted in 10 Documentary History, supra note 175, at 1222, 1223 (John P. Kaminski & Gaspare J. Saladino eds., 1993). R

[304] Id.

George Mason's proposal for the Virginia declaration of rights,[305] expressly connecting the Lockean liberty of conscience with nonestablishment, was adopted by the ratifying convention as a whole:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.[306]

The reasoning of the passage flowed smoothly along Madisonian lines, from the premise that religion must be guided by reason, to the conclusion that there exists an inalienable right to act according to conscience, and thence to the corollary that no religion ought to be favored or established.

North Carolina[307] and Rhode Island[308] proposed almost identical language. New York similarly associated liberty of conscience with a call for nonestablishment in language nearly identical to Virginia's.[309] New Hampshire, more concisely, proposed that "Congress shall make no laws touching religion, or to infringe the rights of conscience."[310] Every draft amendment proposed by the state conventions regarding

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[305] See Letter from George Mason to John Lamb (June 9, 1788), reprinted in 9 Documentary History, supra note 175, at 818, 821 (John P. Kaminski & Gaspare J. Saladino eds., 1990). R

[306] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 659 (Jonathan Elliot ed., 1901) [hereinafter Elliot's Debates]. Another Virginia proposal, by the Society of Western Gentlemen, used different language to make the very same logical connection:

> That the duty of worshipping Almighty God, of enquiring after, and possessing the truth, according to the dictates of conscience, is equally incumbent on all mankind: That for the more general diffusion of benevolence, hospitality, and undissembled honesty, among all ranks of people, the free exercise and enjoyment of religious profession, and worship without *preference*, shall forever hereafter be allowed within the United States.

The Society of Western Gentlemen Revise the Constitution, Va. Indep. Chron., Apr. 30 & May 7, 1788, reprinted in 9 Documentary History, supra note 175, at 769, 772 (John P. Kaminski & Gaspare J. Saladino eds., 1990). R

[307] 4 Documentary History, supra note 175, at 244 (John P. Kaminski & Gaspare J. Saladino eds., 1990). R

[308] 1 id. at 334.

[309] New York's proposal specified: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others." Id. at 328.

[310] Id. at 326.

religion[311] but Maryland's (which called for "religious liberty"[312]) included the word "conscience."[313]

The same was true of the various versions of the Establishment Clause subsequently considered by the House of Representatives. Madison's first draft proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[314]

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311 See McConnell, supra note 13, at 1480-81 & 1481 n.360 (discussing state proposals for amendments that included protection for religious liberty). The dissenters from the Pennsylvania ratification also associated liberty of conscience with establishment. They sought to ensure that the Constitution would not only protect liberty of conscience at the federal level but avoid interfering with state protections of religion:

> The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion.

Dissent of the Minority of the Pennsylvania Convention, Pa. Packet (Phila.), Dec. 18, 1787, reprinted in 1 Debate on Constitution, supra note 265, at 526, 532; see also Proceedings and Debates of the Pennsylvania Convention, supra note 291, at 597 (presenting minority's proposed amendments). In addition to general liberty of conscience, well protected in Pennsylvania, the particular concern of this dissenting minority may well have been for the right to conscientious objection to military service, which Pennsylvania's constitution protected, and which the dissenters invoked in terms of liberty of conscience, see Dissent of the Minority of the Pennsylvania Convention, supra, at 550-51; this would explain the reference to the Executive Branch, which includes the Commander in Chief.

312 "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty." Convention of the Delegates of the People of the State of Maryland, Apr. 28, 1788, reprinted in 2 Debate on Constitution, supra note 265, at 552, 554. The 1776 Maryland State Constitution similarly spoke of religious liberty rather than liberty of conscience. See supra note 195 and accompanying text.

313 There were occasional voices on the other side, too. The town of Townshend, Massachusetts instructed its representative to the state ratifying convention that, although it was not absolutely necessary for the federal government to have the same power to gather funds for religious purposes as it was for state governments, nonetheless,

> we must insist that the Continental Constitution Contain a Bill of Rights which by Express declaration will Secure to us our priviledgs especially our religion and Such rulors to Support it as we can put Confidence in & while we view them as fri[e]nds to the great Author of our religion, may expect his Presence with them, that so they may be ministers of God for the Good of his people for the interest of his religion & for the honour of his Name[.]

Instructions, Townshend, Middlesex County, Dec. 31, 1787, reprinted in 5 Documentary History, supra note 175, at 1055, 1057 (John P. Kaminski & Gaspare J. Saladino eds., 1998). The people of Townshend also were skeptical of disallowing religion tests and wanted to restrict service in office to Protestants. Id. Harvard, Massachusetts also objected to the religious tests clause. Instructions, Harvard, Worcester County, Dec. 17, 1787, reprinted in 5 Documentary History, supra note 175, at 968, 968.

314 1 Annals of Cong. 451 (Joseph Gales ed., 1789). In the wake of the Virginia Assessment Debate, Madison understood that support of religion was the central concern for many supporters of "liberty of conscience." The February 1788 letter to Madison, mentioned earlier, included John Leland's objections to the Constitution. Letter from Spencer to Madison, supra note 298, at 252-54. One objection was that "if a Majority of Congress

This draft was less explicit than the Virginia proposal in explaining that liberty of conscience was the reason for nonestablishment, but the association of the rights of conscience with nonestablishment was still fairly clear. Before the select committee of the House, the draft changed to: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."[315] After a brief debate before the House sitting as a committee of the whole, more about which will follow,[316] the language was amended to: "Congress shall make no laws touching religion, or infringing the rights of conscience."[317] Several days later, the House, without debate, changed the language to: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[318] Before submitting the proposed amendment to the Senate, a final stylistic change was made: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[319]

In the Senate, several versions of the Clause were proposed and rejected. The form that the Senate proposed to the House was the first to omit reference to conscience: "'Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.'"[320] The Senate debates were not recorded, and there is no way to know why conscience fell out of the Senate's formulation. In any case, the conference committee, whose debates also went unrecorded, produced the form that was ultimately enacted, which restored the House's reference to establishment "of religion" and also omitted any reference to conscience.[321]

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with the presedent favour one System more then another, they may oblige all others to pay to the Support of their System as Much as they please." Id. at 254. See also supra text accompanying notes 298-300. R

315 1 Annals of Cong. 757 (Joseph Gales ed., 1789).

316 See infra text accompanying notes 337-44. R

317 1 Annals of Cong. 759 (Joseph Gales ed., 1789).

318 Id. at 796. This change was proposed by Fisher Ames of Massachusetts. For one view of Ames's ideology on the question and place in the debate, see Marc M. Arkin, Regionalism and the Religion Clauses: The Contribution of Fisher Ames, 47 Buff. L. Rev. 763, 786-90 (1999).

319 Journal of the First Session of the Senate of the United States, Aug. 1789, reprinted in 1 Documentary History of the First Federal Congress of the United States of America 104, 136 (Linda Grant DePauw ed., 1972); see also Lee v. Weisman, 505 U.S. 577, 612-15 & 614 n.2 (1992) (Souter, J., concurring).

320 See Curry, supra note 7, at 207 (quoting 1 Documentary History of the First Federal Congress of the United States of America 151, 166 (Linda Grant DePauw ed., 1977)). R

321 The relationship between the two clauses is a subject of ongoing debate and cannot definitively be resolved here. Nonetheless, it may well be that the two clauses originally were both thought necessary to protect liberty of conscience: The Establishment Clause protected individuals from laws that would compel them to participate in a religion speci-

The reasons for the Senate's omission of the reference to conscience are not clear.[322] What is certain is that the notion of liberty of conscience was not being abandoned; rather, protection of free exercise and a ban on establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience. Once these had been specified, it was apparently unnecessary to mention liberty of conscience specifically, because it was included. No new theory of why establishment was wrong suddenly emerged before the Senate or the conference committee. No one involved in the debate over the religion clauses, or indeed anywhere in the eighteenth-century American debates over state and religion, argued against liberty of conscience as a general proposition. It was the theoretical basis for both religion clauses and remained so even after the word "conscience" disappeared from the draft language.

Much ink has been spilled over whether the phrase "establishment of religion" as used by the Framers was intended to encompass nonpreferential as well as preferential establishments.[323] The best answer to this question is probably that the term "establishment" was a contested one. As noted earlier, the word "establishment" was used in both narrow and expansive ways in the debates of the time.[324] Thomas Curry concludes, after much thoughtful discussion, that the concept of establishment that the Framers inherited and kept in mind was that of preferential establishment. Thus, nonpreferential funding systems, like the one proposed for Virginia, did not particularly look to them like establishments. Even the New England Way, which in practice favored one denomination, was described as an establishment only in the sense that it practically preferred Congregationalism.[325]

For the purposes of this Article, the precise meaning of "establishment" need not be specified with certainty, because the goal here is to identify the principle that stood behind the decision that "estab-

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fied by the state, and the Free Exercise Clause protected them from laws that would have barred them from affirmatively engaging in their own religious exercises. This is a natural reading of the religion clauses; it captures the contrast between "establishing religion," which would presumably create certain requirements for the population, and "prohibiting the free exercise" of religion, which would naturally mean blocking certain affirmative actions.

[322] See McConnell, supra note 13, at 1488-89. For McConnell, whose primary interest is the Free Exercise Clause, the question is the substitution of free exercise for rights of conscience; he does not discuss the relevance of conscience for the Establishment Clause. R

[323] See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (arguing that Establishment Clause was intended only to bar preferential support of religion). See generally Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978) (same).

[324] See supra text accompanying notes 195-96. R

[325] Curry, supra note 7, at 210. R

lishment," whatever it was, should be eschewed. It is enough to know that all preferential systems were thought to violate liberty of conscience by compelling either worship or the support of beliefs with which one disagreed. When "establishment" was prohibited, the Framers meant at least that such preferential arrangements violated liberty of conscience and were therefore unacceptable. Whether nonpreferential systems that purported to allow exemptions for dissenters violated liberty of conscience was a subject of debate; even if we assume that Congress did not intend to bar such systems at the federal level (the answer seems shrouded in uncertainty), we still know that the Framers agreed on the principle of liberty of conscience.

As the existence of debates over nonpreferential funding in Virginia and New England suggests, there was no consensus regarding whether nonpreferential funding violated liberty of conscience. But there was broad agreement that liberty of conscience was a basic, inalienable right. There also was agreement that establishment of religion, in the sense at least of a single establishment of a preferential system, violated liberty of conscience because it led to compelled actions against conscience. There is no reason to think that the omission of the words "liberty of conscience" from the First Amendment was intended in any way to undercut these commonly held views. Liberty of conscience was the basic principle that underlay the arguments for nonestablishment at the federal level.

B. The Establishment Clause and Governmental Structure: The Neo-Federalist or Structuralist Objection

At least since the 1950s, some constitutional historians have argued that the language of the Establishment Clause as actually enacted was intended in part to prevent Congress from interfering with existing state establishments.[326] This view has recurred in more recent scholarship as well, in a variety of forms.[327] The final version of the

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[326] See Abington Sch. Dist. v. Schempp, 374 U.S. 203, 254-55 & 254 n.19 (1963) (Brennan, J., concurring) (noting view and arguing that in any case it would not affect incorporation of Establishment Clause, since all states had disestablished before enactment of Fourteenth Amendment). As careful and judicious a critic of received Establishment Clause wisdom as Howe found this reading "unconvincing." Howe, supra note 12, at 22-23. His conclusion is particularly striking in light of his general thesis that the Court has not paid enough attention to the federalist concerns of the Establishment Clause. Howe cites two exponents of this view, which he characterizes as belonging to "a respectable school of thought." Id. at 22 & n.16 (citing Wilber G. Katz, Religion and American Constitutions 8-10 (1964); Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L.Q. 371 (1954)). R

[327] See, e.g., Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1157-60 (1991); Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 118, 298 n.34 (1993); Note, Rethinking the Incorpo-

Clause, the scholarship points out, addresses Congress. It prohibits Congress from making any law "respecting an establishment of religion." This language, they argue, does not simply bar Congress from making a law that establishes religion. It also may be read to bar Congress from making a law respecting an establishment of religion in any of the states. Thus, it is argued, the Clause was intended at least in part, and perhaps primarily, as a structural provision of the Constitution aimed at ordering the relationship between the states and the federal government.

This view has received renewed attention and support in recent years within the context of what is sometimes called the neofederalist project. Neofederalism draws attention to the federal structure of the Bill of Rights and to the Framers' concern with limiting the powers of Congress. Viewing the Bill of Rights through this lens naturally focuses attention on the reading of the Establishment Clause that emphasizes a possible distinction between what the federal government may do and what states may do. It has the further effect of drawing attention away from a view of the Bill of Rights as a document concerned with individual liberties as opposed to limitations on federal action.[328]

The neofederalist view of the Establishment Clause, then, might be read to minimize the degree to which the Clause was concerned with liberty of conscience. If federalism animated the Clause, and if some meaningful element of this federalist impulse was to protect state establishments from congressional interference, then perhaps it is unfair to see the Clause primarily as a protector of individual liberty of conscience. Perhaps the Clause should be seen simply to make the question of establishment a local issue to be resolved within the domain of the states and kept from the federal government.

Several scholars have advanced a similar version of this view, but without the emphasis on the general structural concerns of the Bill of Rights.[329] These scholars argue that because the Framers disagreed about whether government funding of religion was a good idea, they could not possibly have intended the Establishment Clause to embody an answer to this problem. The Clause must have been intended to

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ration of the Establishment Clause: A Federalist View, 105 Harv. L. Rev. 1700, 1706-08 (1992). See generally Cord, supra note 8. But see Note, Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis, 59 N.Y.U. L. Rev. 301, 362 & n.258 (1984) (arguing that because original draft of Free Exercise Clause explicitly bound states, Establishment Clause could not have been meant simultaneously to protect state establishments). R

328 See Amar, supra note 327, at 1157-62. R

329 See, e.g., Conkle, supra note 26, at 1133; Smith, Foreordained Failure, supra note 10, at 21-22. R

"leav[e] the matter of church-state relations to the individual states."[330] On this view, the Establishment Clause represented a compromise between those who supported the elimination of nonpreferential support, as in Virginia, and New Englanders who supported continued nonpreferential arrangements. The consequence of this argument is that

> [i]f we ask, therefore, what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is "None." They consciously chose not to answer the religion question . . . . This observation suggests that it is futile to try to extrapolate or reconstruct a principle or theory of religious liberty from the original meaning of the religion clauses.[331]

The appeal of the structuralist view of the Establishment Clause is understandable. It consists with a broader view of the structure of the Bill of Rights itself and it gives significant meaning to the otherwise awkward formulation "respecting an establishment of religion." What is more, there is something fashionably postmodern about the argument that no principle greater than compromise underlies the Establishment Clause.

The problem with the structuralist view, however, is that the historical evidence does not bear it out. To begin with, the argument that the language of the Clause was intended specifically to protect state establishments is implausible on several grounds.[332] First, there is no evidence in the debates that the last-minute change of language to "respecting an establishment of religion" was intended to protect existing state establishments. Nearly every draft until the conference committee's final formulation said that "Congress shall make no law establishing religion or faith."[333]

Furthermore, as Curry argues, the Framers were using the word "establishment" to refer to a frankly preferential religious arrangement. At the time of the framing of the Establishment Clause, only the New England states had arrangements that anyone could have called "establishments." The dominant Congregationalists, of whom the New England delegations in Congress were exclusively composed, generally did not consider their arrangements to constitute establishment at all.[334] Baptist opponents of the New England Way did (pejo-

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330 Conkle, supra note 26, at 1133. **R**

331 Smith, Foreordained Failure, supra note 10, at 21. **R**

332 For a more general discussion of the debates, see Laycock, supra note 32, at 885-94; see also Lee v. Weisman, 505 U.S. 577, 614-15 & 614 n.2 (1992) (Souter, J., concurring). **R**

333 See supra text accompanying notes 315-22. **R**

334 Only in Connecticut was the arrangement called an establishment by those who supported it. See Curry, supra note 7, at 210. **R**

ratively) call it an establishment, but there is no reason to think that the New Englanders would have sought protection for their mode of funding against Congress through language that required their system to be called an establishment.

Second, and more importantly, it is unlikely that anyone discussing the Clause believed Congress would have the power to interfere with state religious affairs through normal legislation. No part of the Constitution conferred such a power. There was never any hint that Congress could, on the basis of legislation alone, interfere with state religious affairs.

Consider next the argument that the Framers of the religion clauses "could not have agreed on a general principle governing the relationship of religion and government,"[335] so that the Clause must have been concerned primarily with local control, rather than liberty of conscience. There is little or no indication in the debates surrounding the Clause that the Framers even acknowledged that there was a difference between the New England arrangement and that of the other states. As Curry puts it, there existed

> almost total obliviousness on the part of the House to Church-State dissension in New England . . . . This lack of awareness extended even to the Representatives from New England itself. Although Baptists bitterly opposed the New England system of state support for churches, none of them sat in Congress. The Congregationalists dismissed out of hand assertions that their system could be unfair, and opposing views hardly registered on their consciousness. Further, few Americans outside of New England knew of the stinging Church-State disputes that took place there.[336]

In the brief House discussion of Madison's proposed amendment, there was one exchange that raised the issue of New England arrangements. On the table was draft language that "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[337] Madison explained that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[338] Benjamin Huntington of Connecticut objected:

> [Huntington] understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of

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335 Conkle, supra note 26, at 1133. R

336 Curry, supra note 7, at 205. R

337 1 Annals of Cong. 757 (Joseph Gales ed., 1789).

338 Id. at 758.

> their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.
>
> By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed, the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.[339]

Curry interprets this passage to mean that Huntington "feared the amendment might give Congress power to interfere with existing arrangements in the individual states."[340] If this were correct, then perhaps the final version of the Clause could be read to protect states from congressional interference. But on closer analysis, this interpretation is imprecise. Huntington wanted to avoid an interpretation of the Constitution that would bar the New England states' practices of collecting local taxes to support churches. His first statement about "congregations to the Eastward" expressed concern not that Congress might interfere with state establishments, but that the proposed constitutional language, stating that "no religion shall be established by law," might be construed to extend to states, not just to Congress. Huntington did not wish to say that the New England arrangements were an establishment—establishment was a potentially derogatory term—but he was prepared to say that the New England Way might be construed into an establishment.[341] Huntington was not worried about whether Congress would actively bar or interfere with state establishments. He simply sought clarification that the proposed constitutional language would not encroach on New England practices.

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339 Id.

340 Curry, supra note 7, at 203. R

341 Justice Rutledge, referring to this exchange, remarked: "Representative Huntington of Connecticut feared this might be construed to prevent judicial enforcement of private pledges." Everson v. Bd. of Educ., 330 U.S. 1, 42 n.34 (1947) (Rutledge, J., dissenting); see also Bradley, supra note 197, at 91 ("Huntington was asking Madison whether the New England system, much more coercive than even the general assessment opposed by Madison in 1785, might be an establishment."). R

Huntington's second statement, in which he referred ironically (if technically incorrectly) to the example of Rhode Island,[342] followed from his concern that the Constitution not be read to prohibit state establishments. To draft the amendment in such a way as to bar state establishment (as he imagined the Rhode Island charter to read) might allow those bound by bylaws to escape paying church maintenance that they owed. Huntington was very clear, however, that he favored protection of "rights of conscience" and "free exercise of religion." He simply thought these could be protected by language that would not mention establishment and so would preclude the interpretation that worried him.

Huntington was not worried that language protecting liberty of conscience would interfere with New England arrangements. He was not worried that anyone would argue that paying what he owed under bylaws would violate his liberty of conscience. He naturally assumed that no one would be obligated to pay for a church not his own, because this would obviously violate liberty of conscience.

The two responses to Huntington confirm this interpretation. First, Madison proposed that "if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[343] By clarifying that the amendment was intended to avoid a national establishment, Madison was reassuring Huntington that the Constitution would not interfere with nonpreferential state establishments. Dissatisfied with Madison's proposal, Samuel Livermore proposed without explanation that the draft language be amended to read: "Congress shall make no laws touching religion, or infringing the rights of conscience."[344] This proposal, which was shortly adopted, followed Madison's clarificatory explanation of the purpose of the amendment as restricted to what *Congress* could or could not do in the national sphere. It therefore clarified that the amendment would not infringe on what states could do regarding

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[342] Curry points out that the Rhode Island Charter in fact did not prohibit establishment in terms and that "blessed fruits" was intended as an ironic reference to Rhode Island's reputed licentiousness. Curry, supra note 7, at 203. R

[343] 1 Annals of Cong. 758 (Joseph Gales ed., 1789). Here, Madison subtly alluded to his view, expressed in the ratification debates, that religious "freedom arises from that multiplicity of sects which pervades America, and which is the best and only security for religions liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest." 3 Elliot's Debates, supra note 306, at 330. The similarity of this view to Madison's famous argument about faction in Federalist 10 deserves note. The Federalist No. 10 (James Madison). R

[344] 1 Annals of Cong. 759 (Joseph Gales ed., 1789).

their own religious affairs. But this language did not suggest that Congress was being barred from interfering in state affairs—that issue was not even on the table.

It emerges from this analysis that the Framers could and did agree on a principle to justify the Establishment Clause: the protection of liberty of conscience at the federal level. Madison stated explicitly that the purpose was to avoid a national religion that would "compel others to conform." Huntington, the only person involved in the debate who so much as alluded to New England's nonpreferential arrangements, agreed with this principle and in fact insisted on his support for "rights of conscience." He believed, like most New Englanders, that the nonpreferential New England arrangements, whether considered establishments or not, did not violate liberty of conscience, and he wanted such arrangements to continue.

It is thus anachronistic to argue that real (if marginal) disagreement over whether nonpreferential funding violated liberty of conscience made it impossible for the Framers to agree on a principle underlying the Establishment Clause. The Framers agreed that liberty of conscience was to be respected, and they further agreed that a preferential establishment was always undesirable because it violated liberty of conscience. They did not express any specific view on whether the New England arrangements in practice violated liberty of conscience, because they decided to restrict themselves to federal matters. Thus, they abandoned Madison's proposed separate amendment, to the effect that "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."[345] The sole recorded objection to this proposed amendment was that of Thomas Tucker, who said that "it goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do."[346] It would hardly be supposed that the Congress refrained from regulating states with respect to free speech and trial by jury because there was a lack of agreement on the principles underlying these matters. To the contrary, Congress refrained presumably because it thought that it was good housekeeping to leave such matters to the states.

The Establishment Clause as enacted was, obviously, concerned with federal establishment, not with the states. But the relevant question is why the Framers wanted formally to preclude a federal establishment. The answer can be gleaned easily from the contemporary

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[345] Id. at 783.

[346] Id.

discussions: Establishment was understood to be incompatible with liberty of conscience because it compelled support for a church with which dissenters disagreed.

IV
Consequences of the Centrality of Liberty of Conscience

Parts II and III described the intellectual origins of the Establishment Clause in its eighteenth-century context as the protection of the liberty of conscience of religious dissenters from coercion. What, if anything, follows from this historical assessment? How should a better understanding of the Framers' ideas about the separation of church and state inform contemporary discussion of the Establishment Clause?

In the context of constitutional adjudication, one possible answer to this question is that the value of protecting dissenters' liberty of conscience should play a more important role than it currently does in deciding questions of constitutionality under the Establishment Clause. It conceivably could be argued that the history presented here supports the view that courts should find a violation of the Establishment Clause only where government has coerced conscience.[347] Such an approach, it is usually presumed, would leave Establishment Clause doctrine more permissive of government engagement with religious practice and religious institutions than it currently is.[348] As I shall suggest in a moment, we should be cautious about embracing this view uncritically. I also want to make a further point: The history equally lends credence to the view that government should not provide financial support to religious institutions, either directly or indirectly, because doing so would require coercing the conscience of dissenting taxpayers. Such a view likely would lead to a more restrictive interpretation of Establishment Clause doctrine than the Court has recently adopted. Each of these views has its appeal, but as this Part will show, neither should be embraced without careful consideration of what the history demonstrates.

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[347] Cf. McConnell, supra note 6, at 940 ("Recognition of the centrality of coercion—or, more precisely, its opposite, religious choice—to establishment clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action."). R

[348] Thus, McConnell believes that this approach would allow the courts to sustain certain programs that facilitate religious education. Id.

A. Coercion of Conscience and Establishment Clause Analysis

Consider one possible use of the historical evidence that the intellectual origins of the Establishment Clause lie in concern for the liberty of conscience of dissenters: It might be argued that, if the Clause's origins reveal that protection of dissenters' liberty of conscience formed the motivating force behind the Clause, it follows that the Clause only prohibits government from action that coerces the consciences of religious dissenters. If coercion is present, then the Establishment Clause is violated. If coercion is not present, the government action is constitutional. Justice Kennedy has taken a position akin to this one,[349] and the secondary literature has been replete with discussion of this idea.[350]

The first point about such a coercion-based approach to the Establishment Clause is that it frames the Clause not as a general provision for ordering good government, but as a guarantor of a negative liberty right. Notwithstanding its origin in the conception that Christ's dispensation rendered human conscience free over indifferent things,[351] the idea of liberty of conscience by the eighteenth century had come to be called, in explicitly Lockean terms, an "'unalienable right of every rational creature.'"[352] The right to liberty of conscience was understood as a right against being coerced to perform religious actions that violated one's beliefs about the proper way to worship or against being prohibited from performing religious actions that one believed were appropriate for religious worship. Rights against coer-

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[349] See Lee v. Weisman, 505 U.S. 577, 593 (1992) (Kennedy, J.) (holding that coercion is present, and Establishment Clause is violated, when high school students are pressured to "maintain respectful silence" during invocation and benediction led by religious leader); County of Allegheny v. ACLU, 492 U.S. 573, 659-60 (1990) (Kennedy, J., concurring and dissenting) (

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

(citation omitted)).

[350] A collection of numerous sources discussing the question in the wake of *Lee v. Weisman* can be found in Daniel A. Crane, Faith, Reason, and Bare Animosity, 21 Campbell L. Rev. 125, 129 n.18 (1999).

[351] See supra text accompanying notes 63-66. R

[352] See Bailyn, supra note 11, at 249 (quoting Wesley M. Gewehr, The Great Awakening R in Virginia: 1740-1790, at 49 (1930)).

cion were the sorts of rights that Englishmen had traditionally claimed, and the right to liberty of conscience derived from this tradition of negative liberty.[353] Negative liberty is concerned with the coercion of the individual to prevent him from accomplishing some action; it is not concerned with a person's independent capacity to accomplish the action.[354] Understanding the Establishment Clause as a guarantor of negative individual liberty against the state's coercion makes the Clause look similar to many of the other rights found in the First Amendment in particular and the Bill of Rights more generally. It enables us to frame the question whether a given provision violates the Establishment Clause in terms of a straightforward test of a familiar type: Is coercion present?

The initial doctrinal appeal of such a coercion-based negative liberty approach is marked. First, it promises to streamline the complexity of Establishment Clause analysis into a straightforward question. Second, such a coercion approach purports to simplify a complex area of doctrine by reference to an identifiable historical value. It is rare enough in constitutional analysis that such a clear value can be identified; when one does exist, it would seem foolish to neglect its value for deciding hard constitutional questions. Third, the coercion-based approach would use the history of the origins of the Clause to suggest that the doctrinal edifice built up around the Establishment Clause—the *Lemon* test[355] with its cycles and epicycles, the endorsement test[356] with its vague content—is unnecessary and historically misplaced. If the Framers were concerned predominantly with religious coercion, then it would be possible to avoid asking about secular purposes and effects and about the symbolic meanings of public manifestations of religion.

What is more, it is worth noting that such a coercion-based approach to Establishment Clause analysis would not have to be crudely originalist in the sense of simply trying to identify what the Framers

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353 Cf. Gordon S. Wood, The Origins of Vested Rights in the Early Republic, 85 Va. L. Rev. 1421, 1426 (1999) ("For many Englishmen, self-government was never an end in itself but was rather a means to an end. That is to say, in Isaiah Berlin's terms, many Englishmen valued positive liberty, or representative self-government, only so far as it protected negative liberty, or their various individual rights and privileges."). Wood goes on to describe the contrast between this English tradition and the emergence of the civic republican tradition during the American Revolution; but as Part I showed, liberty of conscience has its origins in the rights discourse of the prerevolutionary period.

354 Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118, 122 (1969).

355 See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (requiring secular purpose and effect and no "excessive government entanglement").

356 See County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (defining endorsement as conveying message of inclusion in political community to favored insiders and exclusion to disfavored outsiders).

would have considered coercive. The approach could strive for fidelity to the original purposes of the Establishment Clause[357] while simultaneously acknowledging changed circumstances and beliefs. Thus, it would be possible for an advocate of a coercion-based approach to Establishment Clause jurisprudence to investigate how the eighteenth-century idea of coercion could be developed in a contemporary attempt to apply it.

If one wanted to define coercion more broadly today than did the thinking of the eighteenth century, then it might be possible to argue that in some situations (schools, for example), peer pressure constitutes coercion.[358] One might hesitate to find coercion in public spaces where adults may freely come and go; reasonable people could, and no doubt would, argue about whether coercion existed in a particular situation. One could also argue about the origin of certain sorts of coercion, which could be governmental or societal; and we would probably want to distinguish sharply between coercion originating with the state and coercion derived from background societal convention. It emerges that a coercion-based model does not guarantee particular outcomes in Establishment Clause cases. Nonetheless, it might still be said that the history this Article has described supports the deployment of the concept of coercion in some form as the key to deciding cases under the Establishment Clause.

The reason for caution about using the intellectual origins of the Establishment Clause to make coercion of conscience into the touchstone of Establishment Clause analysis is that the intellectual history does not and cannot fully answer the question of how, precisely, the Establishment Clause institutionally accommodated the value of liberty of conscience. Some of the Framers could perfectly well have aimed, in adopting the Establishment Clause, to prevent coercion of conscience by prohibiting a range of government activities *greater* than the set of actions that directly coerce conscience. Others might have intended to do no more than protect conscience. Thus, the intellectual history does not allow us to conclude definitively that the Constitution is violated *only* by direct coercion.[359]

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[357] See Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1240-42 (1993) (arguing original purpose of Establishment Clause was to avoid direct aid to religion in era where government gave little or no aid to nonprofit sector).

[358] Cf. Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

[359] This is the thrust of the chilling effect doctrine, for example: A law may be unconstitutional even if it does not formally violate negative liberty, if it might have the effect of inhibiting the action that the liberty seeks to protect. For a discussion of the chilling effect

In terms of the relation between actual constitutional provisions and their intellectual origins, this question represents the point at which the rubber of a specific enactment meets the road of background. While the Framers certainly understood protection of liberty of conscience to undergird the Establishment Clause, and all agreed that, in principle, coercion of conscience was wrong, there was, we have seen, no clear consensus on hard questions of whether certain forms of government support of religion should be understood as coercing conscience. As a result, some Framers may have intended the Clause to go beyond situations of coercion to protect conscience more broadly.

Consider government collection and distribution of taxes in a nonpreferential manner for religious purposes. There was broad agreement that coercive taxes for religious purposes would, in principle, violate liberty of conscience. But there was no agreement about whether it was coercive to collect such taxes when the law provided for everyone to designate the religion of his choice as the recipient of his taxes. Many people at the time of the framing, including some Framers,[360] thought that taxation of this sort was perfectly compatible with liberty of conscience. This was the view of most Congregationalist New Englanders. The Massachusetts Constitution, for example, guaranteed liberty of conscience even as it required local taxes to pay for local ministers.[361] Similarly, the supporters of the unsuccessful Virginia Assessment Bill—people such as Patrick Henry—were committed to liberty of conscience[362] and also simultaneously believed that taxation to support religion violated no one's liberty of conscience where the taxpayer could designate the recipient. On the other hand, many people at the time of the framing, including Madison and those in Virginia who supported him, were convinced that taxation in support of religion threatened liberty of conscience, even if it could not be shown that any individual's conscience had been coerced. It is therefore very difficult to argue, based on the intellectual history, that the Establishment Clause was definitively limited to cases of direct coercion. Whether the Clause, as written, protected only against coercion or guarded liberty of conscience more

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and other secondary-effects doctrines in free speech law, see Fred C. Zacharias, Flowcharting the First Amendment, 72 Cornell L. Rev. 936, 986-98 (1987).

360 For example, Huntington of Connecticut. See supra text accompanying notes 339-42. R

361 Mass. Const. of 1780, arts. II-III, reprinted in 5 Sources and Documents, supra note 27, at 92, 93-94. R

362 At the ratification convention, Henry eulogized "rights of conscience" as "sacred" and argued that, without a bill of rights, they could not be secure. See 3 Elliot's Debates, supra note 306, at 317. R

inclusively was debatable in the eighteenth century, just as it is today.[363]

Given that the Framers' generation disagreed on the propriety of certain church-state arrangements, what can be said about whether they sought to bar such arrangements at the federal level when they enacted the Establishment Clause? Those Framers who thought religious taxation should always be banned for reasons of protecting the liberty of conscience of tax-paying dissenters probably believed they were prohibiting such arrangements at the federal level by prohibiting an "establishment of religion." But what of those who believed that such arrangements did not necessarily coerce conscience? They may have shared the same expansive understanding, since the prohibition on establishing religion is ultimately broader than the phrase "coercing the liberty of conscience." But they also may have thought otherwise and understood the Clause as limited to cases of coercion proper.

The point is that an accurate account of the intellectual origins of the Establishment Clause does not, and cannot, provide a definitive answer to the question of what exactly the Establishment Clause prohibited then or prohibits now. The historical analysis does not get us all the way to a doctrinal answer. We ought, therefore, be cautious about using the history in this Article to make "coercion" into the sole test of constitutionality under the Establishment Clause.

B. The Taxpayers' Conscience: Funding of Religious Institutions

It is generally thought that limiting the Establishment Clause to cases of coercion would expand the scope of what government could do in funding religious institutions, such as schools. But this is not necessarily the case. The history of the intellectual origins of the Establishment Clause might be used to take aim at government programs that fund religion, even on a nonpreferential basis. Such an argument would begin by claiming that interpretation of the Establishment Clause today ought to be directed by the principle of liberty of conscience. The argument would then point to the fact that, notwithstanding disagreement on whether certain forms of taxation were desirable, the Framers broadly agreed that coercively *requiring* dissenters to contribute funds to religious purposes with which they disagreed constituted a violation of conscience. Even those Framers who favored taxation in support of religion did so on the understanding

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363 Cf. Robert A. Holland, Comment, A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty, 80 Cal. L. Rev. 1595, 1672-84 (1992) (arguing for religious liberty test to be applied by asking whether coercion has occurred and concluding that aid to religious schools is noncoercive).

that such arrangements made provisions for dissenters to designate their taxes for a recipient of their choice.[364] By contrast, contemporary funding schemes, such as voucher schemes, often do not provide for such an option.

In the light of the history that this Article adduces, the broadly shared eighteenth-century view—that it was wrong to coerce payment of taxes for religious purposes against conscience—could plausibly be presented as central to the Framers' goal in enacting the Establishment Clause. One could then argue that today, the Establishment Clause should be understood to prevent at least—but not only—government funding of religion that violates the consciences of dissenting taxpayers. The first step of such an argument would be to determine that paying taxes is indeed a coerced action in the same sense that any other legally required action in a democratic state can be understood as coerced. One cannot choose whether to perform the action or not. Criminal sanctions can result from failure to pay. If it is coercion when one is required by law to attend church or be punished, one is similarly coerced when required to pay taxes or face punishment.

The second step would be to argue that paying taxes that will go to support religious institutions or teachings that one does not wish to support would violate one's conscience. Not everyone will feel that paying taxes to support the teaching of a religion from which one dissents violates conscience. But it is surely reasonable to assume that some, and perhaps many, people will feel precisely this way. If the Establishment Clause protects liberty of conscience, and if paying taxes for the purpose of funding religious views with which one disagrees violates that liberty, then it might be concluded that using mandatory taxes to provide such funding violates the Establishment Clause.[365]

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[364] See supra text accompanying notes 23-25. R

[365] Of course, even if this view were to prevail, it would not immediately follow that all mechanisms of government funding of religion would violate the Establishment Clause. First, there would be those who would argue that indirect funding of religion, mediated through, say, the individual choices of citizens, could not be attributed to the taxpayer and thus would not violate conscience. The Supreme Court has suggested at various times that there is a difference for Establishment Clause purposes between direct government payment to religious institutions and indirect support that is mediated by individual choice. See Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481, 487 (1986) ("Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."); Mueller v. Allen, 463 U.S. 388, 402 (1983) (holding Establishment Clause not violated by state income tax deduction for educational expenses); cf. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (holding that Establishment Clause permits state funding for sign language interpreter in parochial school). Some academics have invoked this distinction in support of the constitutionality of vouchers. See Minow, Choice or Commonality, supra note 3, at 519-28. On the other hand, if the Clause aims to bar government support of R

The Court has not held expressly that paying taxes to support religious views with which one disagrees violates conscience.[366] Some dicta, however, might be read to tend in that direction.[367] And the association of one's money with one's conscience has appeared in the context of the jurisprudence of compelled speech.[368] So although the

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religion, why should it matter if the state provides funds directly to churches or does so through the agency of private citizens? Compare the familiar argument, admittedly never adopted by the courts, that tax exemptions for religious institutions and tax deductions for contributions to religious institutions ought to be understood to violate the Establishment Clause, because they amount to government subsidy of religious institutions. This argument challenges the distinction between government action (funding religious institutions) and omission (allowing institutions or individuals to go untaxed). But cf. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (striking down tax exemption restricted solely to religious publications). Imagine a Roman Catholic who believes her liberty of conscience is violated by her tax dollars going to support Bob Jones University. She may well feel that her liberty is not less violated by the fact that the money was first passed on by the government to a Protestant and only then earmarked for Bob Jones by the Protestant. To the Catholic, it is still her money. She has been compelled to pay it, and then it has been used for purposes of which she deeply disapproves. Because the Catholic is troubled by the destination of her tax dollars and not by the question of whether government or anyone else has acted on her behalf, the mediation of a private party looks no different from mediation of the government.

Second, it might be argued that nonpreferential funding of religion by the government does not violate conscience, because money goes to every religious denomination according to some roughly proportional principle of distribution, so that in essence, one supports only what one believes. The response might be made that a cross-subsidy will still very likely exist—some denominations will have poorer members than others, so that Episcopalians may end up funding Seventh-Day Adventists. Whether this cross-subsidy violates conscience is another unresolved question.

Third, it might be argued that government could fund religion without violating conscience so long as it provided the opportunity for dissenters to opt out of paying that portion of taxes that would go to support the beliefs with which the dissenter disagreed. This view might in theory satisfy the condition that conscience not be violated. But in practice, even in the eighteenth century, it was difficult to obtain exemptions from paying taxes even where the law promised such exemptions. The same practical problem might persist today.

366 The doctrinal analogue to this argument currently exists not in the context of Establishment Clause doctrine, but in the area of compelled speech. See infra note 368 and accompanying text. **R**

367 See County of Allegheny v. ACLU, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring and dissenting) (speaking of "more or less subtle coercion . . . in the form of taxation to supply the substantial benefits that would sustain a state-established faith").

368 See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229-34 (2000) (9-0 decision) (holding that compelled-speech principles do not require that dissenting students be exempted from paying activities fee that supports groups that engage in political speech); Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 472 (1997) (finding that expenditure in question did not occasion any "crisis of conscience"); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) ("[I]n a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."). The compelled-speech doctrine itself developed out of W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that Jehovah's Witnesses could not be compelled to salute flag). There, the notion of conscience was evident, especially in the concurrence of Justice Murphy, who invoked the word "conscience" itself, as well as Jefferson and the Virginia statute for

Court has not yet gone this far, it is possible to imagine the Court saying that paying taxes for religious purposes with which one disagrees amounts to a violation of the liberty of conscience.

There is one serious objection to the argument that taxes for religious purposes violate conscience. To what extent is it plausible today to argue that tax dollars spent by the state to support religious teachings or institutions may be attributed to the individual taxpayer? The state does much more by way of action and expenditure today than it did in the eighteenth century, and it raises taxes for a wider variety of purposes. Particular taxes today generally are not earmarked for particular purposes. What is more, government uses taxes to fund a wide range of activities, from the military to family planning, some of which doubtless offend the consciences of some taxpayers. Can we argue today that religion is somehow different from other state purposes, or would we be required to respect conscience in every case and conclude that anyone who disagrees fundamentally with a government expenditure may choose to opt out of paying taxes for that purpose?

In the eighteenth century, no one seemed to have suggested that taxes for religious purposes could not be attributed to the taxpayer. In that environment, it might be said, the citizen knew where his taxes were going, especially at the local level. A tax for religious purposes felt like exactly that. By contrast, this is often not so today.[369]

For a religious dissenter to make a convincing case that his liberty of conscience has been violated, he must at least make an argument about his own subjective consciousness of coercion. When the government funds religion with the dissenter's taxes, the dissenter must convince us that his association with the acts of the government is close enough that the mere presence of his money in the government's treasury makes the expenditure an expression of his own will. In principle, the dissenter could make this argument today, as dissenters did in the eighteenth century. He could maintain that when the treasury expends funds in support of views he rejects (and even when the expenditure is indirect), he feels that his conscience has been violated. The trouble with this argument is that it begins to look like an inappropriately sensitive account of the relation of one's tax dollars to government action. What might have seemed intuitive in the eighteenth century sounds less obvious in the twenty-first.

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religious freedom. See id. at 645-46 (Murphy, J., concurring). Barnette did not involve expenditure, but actual speech.

[369] Of course, there are instances of closer connections in the modern world. Our property taxes, for example, often support schools, and the connection is well understood.

One possible response is to say that the Establishment Clause seeks to protect even the most sensitive dissenter, one who attributes any government action to himself. This is not entirely satisfying, though, because it would seem to leave government action hostage to idiosyncratic and unconvincing claims. What we need is a closer examination of the nature of the relationship between taxpayer and government for purposes of negative liberty interests. Why do we think that a government's actions implicate the conscience of the individual taxpayer? And if they do, should we care at all if government expenditures violate liberty of conscience?

After all, government does all sorts of things with tax dollars that run contrary to the desires and beliefs of individual citizens. Governments spend on war, on abortion or contraception, on controversial social programs to which some citizens deeply and even religiously object. The federal government spends on foreign aid to nations with all sorts of ideals and goals against which conscience might rebel. Citizens disagree with any or all of these policies; yet we do not have the intuitive feeling that these actions should be attributed to the citizens individually. We would be surprised and probably worried by the argument that citizens should be able to avoid paying that portion of their taxes that goes to support activities of which they disapprove.

Government does many things with which we disagree. I may have voted against the action in question or against the official who made the decision, or perhaps I did not vote at all. Indeed, I may feel disengaged from the actions that government then takes. The government, after all, is my agent, but not only *my* agent; it is also the agent of the rest of the citizens, and in a different way, of the officials who run it. It might follow from this that the connection between my act of taxpaying and the government's act of tax disbursement is so tenuous that it would seem misguided to describe my conscience as meaningfully violated by the eventual destination of my tax dollars.

For all this, the attribution argument has not been completely exhausted. There are some good reasons to think that state action implicates the taxpayer's conscience. The power of this intuition may be seen in the doctrines associated with so-called compelled speech. Where one's resources are used to facilitate particular speech, in a newspaper,[370] say, although not in contributing to a student activities fund,[371] the courts have held that my expenditure has a direct connec-

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[370] See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254-58 (1974) (holding that law requiring newspapers to grant space to candidates attacked in newspaper violates Free Speech Clause).

[371] *Southworth*, 529 U.S. at 221 (holding that compelled speech doctrine does not bar public university from charging student activities fee without possibility of opt-out).

tion to the speech in question. If I am made to pay, I am made to speak. Though I might disclaim the content of the speech, the connection has been thought close enough to protect me from being forced to support it.

Yet the scale of the institutions at issue in compelled-speech cases has always been much smaller than the government as a whole. The government differs from the newspaper or cable station in that the private medium has but one owner (who may be corporate), and it is the owner's forum that is being appropriated. The government, on the other hand, has as many owners as taxpayers. The relationship between the taxpayer and the speech, or in our context, the government action, is therefore more tenuous. It is notable that expenditure-as-compelled-speech cases have so far not involved the claim that one's taxes necessarily support the speech undertaken by local or state government; they instead focus on smaller, more discrete organizations like unions,[372] bar associations,[373] trade organizations,[374] and universities.[375] One has trouble imagining the courts accepting the compelled-speech argument with respect to tax dollars and subsequent government expenditure. Even though the relationship between taxes and the funded speech seems to be structurally analogous to the relationship between activity fee and funded activity, the multiplicity of the citizens and of the government's activities makes the case of taxes seem much more tenuous.

Despite the tenuousness of the taxpayer's connection to the action of the tax-benefiting entity, the intuition that this connection exists is sound. This intuition depends on two ideas. The first is that when one's actions contribute to a collective whole, that whole bears some important relation to its constituent parts. This could be so when the whole acts on the basis of votes or of financial contributions or of any other set of discrete actions, whether taken freely or otherwise. Associated with this idea is the notion that in a democracy, one ought not understand the actions of the government as entirely disconnected from the actions of the citizens. There is a difference between what the government does with my money and what the retailer

372 *Abood*, 431 U.S. at 235-36 (holding that employee must have right to opt out of union dues used to promote ideological cause).

373 Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (holding that state bar may not use compulsory dues for political lobbying).

374 Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 460 (1997) (holding that minority opposition in trade group to generic advertising does not override majority judgment that such programs are beneficial).

375 *Southworth*, 529 U.S. at 221 (holding that compelled speech doctrine does not bar public university from charging student activities fee).

does with my money once I have paid for my goods. The government acts on my behalf.

The second idea that contributes to the intuition of taxpayer connection is that in the political context, money functions as an enabler of speech.[376] Of course, my compulsory taxes differ from my voluntary political contributions and bear less relation to my free choice. But in both contexts, my money has the effect of facilitating expressions of action that I could not achieve directly on my own. I could not fund schools alone, nor could I run for office. In the requirement of resources, both projects are necessarily collaborative. The collaborators are those who provide funding.

It is thus not impossible to argue that, notwithstanding the scope of activities undertaken by the modern state, expenditure of taxpayer funds might be sufficiently closely related to the taxpayer's conscience to engage our active concern. It is at least intriguing that one of the only areas in which the Court has accepted taxpayer standing as sufficient under Article III is that of the Establishment Clause.[377] This might be read to suggest that in the context of the Establishment Clause, at least, the government's actions may be attributed to the taxpayer more closely than in other contexts.[378] After all, it need not be the case that everyone's conscience is troubled by what the state does with his funds. If only a few people are thus troubled, their liberty of conscience may nonetheless be worthy of protection.

The problem of attribution leads to yet another challenge, this one grounded not in the changed character of the government, but in the very coherence of the theory of attribution. The challenge is this: If government violates taxpayers' liberty of conscience every time that it acts in ways that trouble the individual dissenter, then perhaps the Constitution is not, in fact, worried about this sort of coercion of conscience at all. One possible answer is that the Establishment Clause had a specific purpose in mind. It aimed to afford protection to the conscience of dissenters by restricting government action to matters

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[376] See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (explaining that while money is not itself speech, "it *enables* speech" and is therefore protected by First Amendment in election context).

[377] See Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (finding taxpayer standing in Establishment Clause case on grounds that Clause "was designed as a specific bulwark against" taxing for religious purposes, and invoking Madison); see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 500-10 (1982) (Brennan, J., dissenting) (reviewing historical basis for *Flast* decision).

[378] This could be for historical reasons, i.e., because the history of the Establishment Clause derives from a world where concerns with taxpayers' liberty of conscience was paramount; or it could be for the more trivial reason that in the absence of taxpayer standing, it would be difficult for anyone in an Establishment Clause case to show the injury in fact necessary for standing.

that belong within the secular sphere.[379] The Framers understood that the secular sphere remained an area where government would have to act, even when individuals might prefer that it did not. They knew as clearly in their day as we do now that a government that never took action in violation of the conscience of any citizen would do precious little. The Framers were familiar with Quaker pacifism, for example; but they never doubted that Quakers could be made to pay taxes that funded governmental actions that included violence.

Liberty of conscience, on this view, functions as a guide to understanding the Establishment Clause, not as an independently mandated constitutional goal. In other words, the Establishment Clause only bars the government from doing things that violate conscience in a way that could be understood to fall within the model that the Framers would have thought of as establishing religion. Funding war or abortion may well violate some taxpayers' liberty of conscience, but the important thing is that the Constitution never suggested that individual liberty of conscience should be protected from government actions that on their face have nothing to do with religion. The Constitution could not practically have been drawn to preserve everyone's liberty of conscience in all things. It protects liberty of conscience, it would appear, only in the sphere of government action that relates *specifically to religion*.

It may be true as a historical matter that the Framers took special care to protect liberty of conscience for the simple reason that it was understood in the eighteenth century and before as a religious right. But the modern understanding of liberty of conscience seems to be that every person is entitled not to be coerced into performing actions or subscribing to beliefs that violate his most deeply held principles.[380] This definition differs fundamentally from that of the eighteenth century in that it is secular.[381] To the eighteenth-century mind, liberty of

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[379] "Religion" still must be defined; the liberty-of-conscience theory offers no escape from this inevitability.

[380] Cf. James E. Wood Jr., The Relationship of Religious Liberty to Civil Liberty and a Democratic State, 1998 B.Y.U. L. Rev. 479, 486 ("[F]reedom of conscience [holds] to the inherent right of each person to follow the dictates of his or her own conscience without interference from civil authority or submission to majority opinion."). The modern cases in which the Court has suggested that the Establishment Clause bars coerced religious expression, most prominently Lee v. Weisman, 505 U.S. 577, 593 (1992) (barring prayer at graduation ceremony), are consistent with this approach: Those who wished not to pray did not have to show that their religion per se prohibited participating in the prayer to which they objected; for standing purposes, it sufficed, presumably, for them to state that their deeply held principles were violated by the coerced prayer.

[381] This definition follows the view of the Court that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all" and embraces the "conscience of the infidel[ ] [or] the atheist" as much as

conscience meant that the individual must not be coerced into performing religious actions or subscribing to religious beliefs that he believed were sinful in the eyes of God and that could therefore endanger his salvation. Indeed, it was, following Locke,[382] literally "absurd, to speak of allowing Atheists Liberty of Conscience,"[383] because conscience necessarily related to one's salvation, in which atheists presumably disbelieved altogether. Because this view seems implausible today, liberty of conscience may require some justification other than the religious justification that underlay the eighteenth-century version of the theory.[384] Put another way, if the Establishment Clause really was meant to protect dissenters from being implicated in state action which violated deeply held religious principles, then what warrant have we for refusing to extend this principle beyond the bounds of religion, to nonreligious principles and nonreligious actions?

The answer to this question is not easily given. Our secular consciousness tends to suggest that protection previously reserved for religion should be extended to other deeply held beliefs.[385] This has been the doctrinal trend in the sphere of conscientious objection.[386] To the extent that we still tend to be more likely to protect deistic beliefs that look like our preconceived notion of "religions," this is a

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that of the religious person. Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985). This view was foreshadowed in Welsh v. United States, 398 U.S. 333, 343-44 (1970) (extending conscientious objector status to nonreligious principles); see also id. at 356 (Harlan, J., concurring) (Congress cannot distinguish between theistic and non-theistic beliefs in extending conscientious objector status). But see Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149, 187-223 (1991) (arguing against transplantation of religious protection to nonreligious values).

[382] See A Letter Concerning Toleration, supra note 119, at 47 ("[T]hose that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration."). R

[383] Dickinson, supra note 164, at 35. R

[384] Although doing so is beyond the scope of the Article, it may remain possible, but difficult, to defend liberty of conscience on secular grounds. Like Locke, see id. ("Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all."), contemporary liberals are typically not prepared to extend toleration to views (say, illiberal visions of the good life) that are foundationally opposed to their own and that fundamentally threaten liberalism. See generally Stanley Fish, Mission Impossible: Settling the Just Bounds Between Church and State, 97 Colum. L. Rev. 2255, 2255 (1997) (arguing that debate regarding church-state relationship has not progressed from Locke's discussion and that liberalism cannot coherently accommodate illiberal views).

[385] For an argument about the particular value of religion to "progressive" society, see generally Rodney K. Smith, The Role of Religion in Progressive Constitutionalism, 4 Widener L. Symp. J. 51 (1999).

[386] See Welsh v. United States, 398 U.S. 333, 343-44 (1970).

problem we acknowledge and seek to solve. Why should we not do the same in the context of the Establishment Clause?

There is probably no principled answer that would satisfy someone who takes seriously the idea of protecting conscience. Referring to the text of the Constitution is dissatisfying, because our ideas about liberty have developed and changed since the enactment of the Bill of Rights, just as surely as the scope of government action has expanded. Sophisticated originalism can claim plausibly that it is possible to use analogy to apply the Framers' principles to new factual circumstances, but it is much harder to explain what to do with the principles themselves when they have evolved internally.

The so-called "translation" model usefully demonstrates the extreme difficulty of such an attempt to "update" the principles that underlay particular constitutional provisions.[387] Suppose one were to seek to "translate" the Lockean conception of liberty of conscience to a modern, broader conception wherein all deeply held beliefs, rather than religious ones alone, are to be protected. This sounds superficially straightforward, but the implications turn out to be far-reaching. Suppose conscience is understood in secular terms. What, then, is the rationale for protecting conscience only when the state acts in a way that has religious content? Why should not the principle of liberty of conscience protect the citizen against paying taxes for any and all purposes that violate conscience? Only so long as conscience is taken in religious terms is it plausible to make the originalist's response that the Establishment Clause's protection was intended to extend only to matters of religion. But broaden conscience to include secular matters of deep belief, and the Lockean distinction between the sphere of the church and that of the state evaporates. Suddenly, there is no clear rationale for allowing government to take any action of any kind where it violates conscience; or alternatively, all attempts to protect conscience look unjustifiable.

This problem with manipulating the Framers' conceptual notions by some process of analogy constitutes one of the most serious pitfalls of even a sophisticated originalist approach to constitutional questions. Perhaps we *should* consider extending liberty-of-conscience arguments outside of religion itself.[388] To expand liberty of conscience this way, however, we would need to recognize that our move would

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387 See generally Lessig, supra note 357. R

388 Michael Sandel warns of the danger of understanding religious beliefs as voluntary choices, because "[i]f all religious beliefs are matters of choice . . . it is difficult to distinguish between claims of conscience on the one hand and personal preferences and desires on the other." Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 70 (1996).

have consequences for the very logic of the constitutional arrangements that have emerged from the interpretation of the text.

Conclusion: Intellectual History and the Constitution

This Article has examined the Establishment Clause and the separation of church and state through the lens of intellectual history. It proposed a significant revision of the now-standard picture of what the Framers thought about separation of church and state. In the context of political discourse, the intellectual history that this Article has described might be used to modify two opposed, but equally imprecise, versions of the Framers' thinking about church and state. To those who might seek to portray the Framers as secularists on the model of the French *philosophes*, protecting rational government from irrational religion, the history offered here should provide a corrective. The Framers' Lockean view was, in fact, grounded in a set of ideas with both religious and philosophical purchase.

But the history also offers a corrective to those who would seek to claim that the Establishment Clause was motivated by an evangelical Christian impulse to keep religion free from the corruption of worldly affairs. Roger Williams's views were not invoked at the Framing. The evangelical supporters of separation, as much as the rationalists, argued for separation on the basis of the twin Lockean views that the temporal power lacked authority to coerce in matters of religion and that individual reason and choice must be paramount in religious belief. They did not primarily argue that government involvement with religion would corrupt religion. Having claimed that liberty of conscience was the driving engine of thought about separation, this Article then considered some consequences of this reexamination of the received wisdom.

In one sense, this Article belongs within the genre of the sort of historical work that constitutional scholars have increasingly undertaken in recent years. Received ideas need to be reassessed for progress to be made. The relevance of this kind of historical work to constitutional scholarship no longer requires a lengthy argument in justification. As Larry Kramer has observed, "[w]e are all originalists, we are all non-originalists."[389] Almost no scholar or judge is prepared to ignore the role of history in the shaping of constitutional questions, and almost no scholar or judge is prepared to claim that nothing matters outside of history.

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[389] Larry D. Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 677 (1999).

Nonetheless, there is history, and there is history. Some scholars are particularly interested in political history.[390] Others mine institutional or social history to make claims about constitutional development. After all, constitutions are creatures of politics; they order and affect institutions, and they change in complex interaction with social movements. So why should *intellectual* history, in particular, cast light on problems in constitutional thinking?

Intellectual history has particular value in the context of constitutional thought because constitutional discourse in the United States takes the form of reasoned argument about ideas. Politics, institutions, and social forces matter tremendously, of course, for constitutional formation and development. But to attempt to make sense of American constitutionalism requires an engagement with the reasons people give and have given for the decisions they want to make. Of course, people sometimes do not say what they mean or say what they do not mean. At the same time, it would be short-sighted to deny the importance of ideas in constitutional discourse. They are the stuff that constitutions are made on.

The centrality of ideas to constitutional formation and development figures with particular salience in the context of the origins of the Establishment Clause. The relationship between church and state has been one of the crucial questions in Western constitutional thinking since the Middle Ages.[391] By affirmatively adopting nonestablishment, the Framers took a step unprecedented in that history. Such a step did not emerge simply from political forces pushing at one another or from a compromise among social forces with deeply opposed views. It required an intellectual leap, one derived from a process of reasoning and discussion. The project of sustaining the legacy of the nonestablishment decision since the eighteenth century has involved politics, both electoral and institutional, and it has implicated many important social movements. But the nonestablishment project has also required reasoned argument, which is to say, it has required ideas. Knowing how these ideas got their start in our constitutional context makes all the difference in the world.

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[390] In the Establishment Clause context, see, for example, John C. Jeffries & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001).

[391] See generally 1-2 Quentin Skinner, The Foundations of Modern Political Thought (1978).